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Supreme Court of the United States

OCTOBER TERM, 1958

No. 43

THE VESSEL M/V "TUNGUS", HER BOILERS, ETC. AND DEN NORSKE AFRIKA-OG AUSTRALIE-LINIE, WILHELMSENS DAMPSKIBSAKTIESEL-SKAB, ET AL., PETITIONERS,

vs.

OLGA SKOVGAARD, ADMINISTRATRIX AD PROSE-QUENDUM OF THE ESTATE OF CARL E. SKOV-GAARD, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 24, 1958
CERTIORARI GRANTED JUNE 9, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

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IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,025
(Associated Appeal No. 12,031)

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased, Libellant-Appellant,

against

The vessel, "M. V. TUNGUS", her boilers, engines, tackle, apparel and furniture, Respondent-Appellee,

and against

EL DORADO OIL WORKS, Respondent-Impleaded-Appellee.

Appeal from a judgment of the United States District Court for the District of New Jersey
(Civil Action No. 12-55)

Appendix of Libellant-Appellant—
Filed September 20, 1956

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

RELEVANT DOCKET ENTRIES

1-13-55	Received from So. District of New York and filed on 1-12-55:
	Libel and complaint (originally filed 11-5-53)
	Petition to implead El Dorado Oil Works (originally filed 1-11-54)
	Answer of Den Norske Afrika, etc. (originally filed 1-11-54)
	Libelant's interrogatories (originally filed 3-22-54)
	Respondent's interrogatories (originally filed 6-22-54)
	Order granting leave to implead El Dorado Oil Works (originally filed 10-25-54)
	Impleading petition (originally filed 10-28-54)
	Notice of motion to transfer action (originally filed 11-30-54) with order endorsed thereon (12-22-54) granting motion.
3- 4-55	Answer of Respondent-impleaded to libel, filed.
3- 4-55	Answer of Respondent-impleaded to impleading petition, filed.
4-15-55	Libellant's answers to interrogatories, filed 4-14-55
4-29-55	Answer to interrogations propounded by Libelant, filed
8-24-55	Interrogatories of respondents to respondent-impleaded, filed 8-23-55
9-22-55	Pre-trial Conference. (9-21-55) (Modarelli)
9-30-55	Answers to Interrogatories by respondent-impleaded, filed
11- 4-55	Trial without Jury before Hon. Alfred E. Modarelli. (11-3-55)

11- 7-55	Trial continued: (11-4-55)
11- 9-55	Trial continued: (11-7-55)
11-10-55	Trial continued: (11-9-55)
11-14-55	Trial continued: (11-10-55)
12-13-55	Transcript of Testimony, filed 12-9-55 (2 Vols.)
6-13-56	Opinion, filed 6-11-56 (Modarelli) (Libel to be dismissed)
6-22-56	Judgment dismissing Libel, without costs filed 6-21-56 (Modarelli)
6-27-56	Amended Judgment dismissing Libel, without costs filed 6-25-56 (Modarelli)
7-10-56	Notice of Appeal, filed 7-9-56

[fol. 2]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

LIBEL AND COMPLAINT—Filed November 5, 1953

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the estate of Carl E. Skovgaard, deceased,

against

The vessel, "MV Tungus", her boilers, engines, tackle, apparel and furniture

and against

All persons claiming any interest therein, and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFRT (sic) IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC., in a cause of action in tort for damages for personal injuries, civil and maritime, alleges as follows:

First Cause of Action

First: Libelant, OLGA SKOVGAARD, administratrix ad prosequendum of the Estate of Carl E. Skovgaard, deceased, is a resident of the United States, residing at 85 Bostwick Avenue in the City of Jersey City, County of Hudson and State of New Jersey, and is a citizen of the State of New Jersey and of the United States of America.

Second: Libelant, OLGA SKOVGAARD, was appointed administratrix ad prosequendum of the estate of Carl E. Skovgaard, deceased, by Lewis G. Hansen, Surrogate of [fol. 3] the County of Hudson, State of New Jersey, on the 28th day of July, 1953.

Third: The vessel, "MV TUNGUS", is now found or during the pendency of this action will be found within the Port of New York and within the jurisdiction of this Honorable Court.

Fourth: The respondents, DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIB-SAKTIESELSKAB, A/S TONSBERG, A/S TANK-FART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, were and still are foreign corporations having offices and places of business at 17 Battery Place, in the Borough of Manhattan, City, County and State of New York.

Fifth: The respondent, BARBER STEAMSHIP LINES, INC., was and still is a corporation of the State of New York, having an office and place of business at 17 Battery Place, in the Borough of Manhattan, City, County and State of New York.

Sixth: At all times hereinafter mentioned, the respondents, DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, were the owners of and in possession of, operated, managed and controlled the vessel, "MV TUNGUS".

Seventh: At all times hereinafter mentioned, the respondent, BARBER STEAMSHIP LINES, INC., operated, managed and controlled the vessel, "MV TUNGUS".

Eighth: On or about December 6, 1952, libelant's intestate was in the employ of Eldorado Oil Works, an independent contractor, performing work aboard the said vessel, "MV TUNGUS", while it was in the navigable waters of the United States, docked at the foot of 22nd Street, in Bayonne, New Jersey, and libelant's intestate [fol. 4] was an invitee upon said vessel.

Ninth: On or about December 6, 1952, while the libelant's intestate was performing his work upon the deck of the said vessel, "MV TUNGUS", pursuant to his duties, suddenly, due to the unseaworthy condition of the said vessel, he was caused to fall into the hold, resulting in his death on December 6, 1952.

Tenth: The libelant's intestate left him surviving as his sole heirs and next of kin, his widow, Olga Skovgaard, and infant children, Mary Elizabeth Skovgaard, Carolyn Skovgaard, and Christine Skovgaard, who have sustained pecuniary loss as a result of the death of Carl E. Skovgaard.

Eleventh: This action is commenced within two years after the happening of the accident and death of Carl E. Skovgaard, deceased.

Twelfth: That there is and at all times hereinafter mentioned, there was in force in the State of New Jersey, the place where the accident and death hereinafter referred to happened, a death statute which was in force and effect at the time of the death of the deceased, which said statute is in Revised Statutes of New Jersey 2A:31-1 to 6 inclusive.

Thirteenth: That by reason of the premises, the said next of kin of the deceased, Carl E. Skovgaard, have been damaged in the sum of Two Hundred Thousand ($200,000.) Dollars.

Fourteenth: All and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States of America and of this Honorable Court.

Wherefore, libelant prays:

1. That process in due form of law and according to the [fol. 5] rules and practice of this court in causes of admiralty and maritime jurisdiction may issue against the vessel, "MV TUNGUS", her boilers, engines, tackle, apparel and furniture and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and said "MV TUNGUS", her engines, etc., may be condemned and sold to satisfy the claim of the libelant aforesaid, with costs; and that

2. Monitions issue to the respondents, DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC., which are and may be served within the jurisdiction of this court, and that each of them be required to answer under oath all and singular the matters aforesaid; and

3. That this Honorable Court may be pleased to decree the payment of the amount due as aforesaid to the libelant, as her damages with interest and costs against the respondents as their several liabilities may appear; and

4. That the libelant herein may have such other and further relief in the premises as in law and justice she may be entitled to receive.

Second Cause of Action

Fifteenth: The libelant, OLGA SKOVGAARD, administratrix ad prosequendum of the estate of Carl E. Skovgaard, deceased, repeats, reiterates and realleges each and every allegation contained in paragraphs First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth of the First Cause of Action and makes the same a part hereof.

[fol. 6] Sixteenth: On or about December 6, 1952, while the libelant's intestate was performing his work upon the deck of the said vessel, "MV TUNGUS", pursuant to his

duties, suddenly, due to the negligence, carelessness and recklessness of the respondents, their agents, servants and employees and by the negligence of the master, officers and crew of said vessel, he was caused to fall into the hold, resulting in his death on December 6, 1952.

Seventeenth: Said accident was caused without any fault on the part of the libelant's intestate, wholly and solely by the defective, unsafe and unseaworthy condition of the vessel, and by the negligence of the respondents, their agents, servants and employees, and by the master, officers, and crew of said vessel.

Eighteenth: The libelant's intestate left him surviving as his sole heirs and next of kin, his widow, Olga Skovgaard and infant children, Mary Elizabeth Skovgaard, Carolyn Skovgaard, and Christine Skovgaard, who have sustained pecuniary loss as a result of the death of Carl E. Skovgaard.

Nineteenth: This action is commenced within two years after the happening of the accident and death of Carl E. Skovgaard, deceased.

Twentieth: That there is and at all times hereinafter mentioned, there was in force in the State of New Jersey, the place where the accident and death hereinafter referred to happened, a death statute which was in force and effect at the time of the death of the deceased, which statute is in Revised Statutes of New Jersey, 2A:31-1 to 6 inclusive.

Twenty-first: That by reason of the premises, the said next of kin of the deceased, Carl E. Skovgaard, have been [fol. 7] damaged in the sum of Two Hundred Thousand ($200,000.) Dollars.

Twenty-second: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States of America and of this Honorable Court.

Wherefore, libelant prays:

1. That process in due form of law and according to the rules and practice of this court in causes of admiralty

and maritime jurisdiction may issue against the vessel, "MV TUNGUS", her boilers, engines, tackle, apparel and furniture and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and said "MV TUNGUS", her engines, etc., may be condemned and sold to satisfy the claim of the libelant aforesaid, with costs; and that

2. Monitions issue to the respondents, DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC., which are and may be served within the jurisdiction of this court, and that each of them be required to answer under oath all and singular the matters aforesaid; and

3. That this Honorable Court may be pleased to decree the payment of the amount due as aforesaid to the libelant, as her damages with interest and costs against the respondents as their several liabilities may appear; and

4. That the libelant herein may have such other and further relief in the premises as in law and justice she may be entitled to receive.

[fol. 8] *Third Cause of Action*

Twenty-third: The libelant, OLGA SKOVGAARD, administratrix of the estate of Carl E. Skovgaard, deceased, is a resident of the United States, residing at 85 Bostwick Avenue, in the City of Jersey City, County of Hudson and State of New Jersey, and is a citizen of the State of New Jersey and of the United States of America.

Twenty-fourth: Libelant was appointed administratrix of the estate of Carl E. Skovgaard, deceased, by Lewis G. Hansen, Surrogate of the County of Hudson, State of New Jersey, on the 13th day of August, 1953.

Twenty-fifth: The libelant, OLGA SKOVGAARD, administratrix of the estate of Carl E. Skovgaard, deceased, repeats and realleges paragraphs Third, Fourth, Fifth,

Sixth, Seventh, Eighth, and Ninth of the First Cause of Action and makes the same a part hereof.

Twenty-sixth: By reason of the premises aforementioned, libelant's intestate, Carl E. Skovgaard, was injured, bruised and wounded, and became sick, sore, lamed and disabled and was permanently injured, that he was prevented from attending to his usual work, that sums of money were expended in an endeavor to cure him of his injuries aforesaid, and prior to his death on December 6, 1952, endured great pain and suffering, all to his damage in the sum of Fifty Thousand ($50,000.) Dollars.

Wherefore, libelant prays:

1. That process in due form of law and according to the rules and practice of this court in causes of admiralty and maritime jurisdiction may issue against the vessel, "MV TUNGUS", her boilers, engines, tackle, apparel and furniture and that all persons claiming any interest therein [fol. 9] may be cited to appear and answer all and singular the matters aforesaid, and said "MV TUNGUS", her engines, etc., may be condemned and sold to satisfy the claim of the libelant aforesaid, with costs; and that

2. Monitions issue to the respondents, DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC., which are and may be served within the jurisdiction of this court, and that each of them be required to answer under oath all and singular the matters aforesaid; and

3. That this Honorable Court may be pleased to decree the payment of the amount due as aforesaid to the libelant, as her damages with interest and costs against the respondents as their several liabilities may appear; and

4. That the libelant herein may have such other and further relief as in law and justice in the premises she may be entitled to receive.

Fourth Cause of Action

Twenty-seventh: The libelant, OLGA SKOVGAARD, administratrix of the estate of Carl E. Skovgaard, deceased, is a resident of the United States, residing at 85 Bostwick Avenue, in the City of Jersey City, County of Hudson and State of New Jersey, and is a citizen of the State of New Jersey and of the United States of America.

Twenty-eighth: Libelant was appointed administratrix of the estate of Carl E. Skovgaard, deceased, by Lewis G. Hansen, Surrogate of the County of Hudson, State of New [fol. 10] Jersey on the 13th day of August, 1953.

Twenty-ninth: The libelant, OLGA SKOVGAARD, administratrix of the Estate of Carl E. Skovgaard, deceased, repeats and realleges paragraphs Third, Fourth, Fifth, Sixth, Seventh and Eighth of the First Cause of Action and makes the same a part hereof.

Thirtieth: The libelant, OLGA SKOVGAARD, administratrix of the estate of Carl E. Skovgaard, deceased, repeats and realleges paragraphs Sixteenth and Seventeenth of the Second Cause of Action and makes the same a part hereof.

Thirty-first: By reason of the premises aforementioned, libelant's intestate, Carl E. Skovgaard, was injured, bruised and wounded, and became sick, sore, lamed and disabled and was permanently injured, that he was prevented from attending to his usual work, that sums of money were expended in an endeavor to cure him of his injuries aforesaid, and prior to his death on December 6, 1952, endured great pain and suffering, all to his damage in the sum of Fifty Thousand ($50,000.) Dollars.

Wherefore, libelant prays:

1. That process in due form of law and according to the rules and practice of this court in causes of admiralty and maritime jurisdiction may issue against the vessel, "MV TUNGUS", her boilers, engines, tackle, apparel, and furniture and that all persons claiming any interest therein may be cited to appear and answer all and singular the

matters aforesaid, and said "MV TUNGUS", her engines, etc., may be condemned and sold to satisfy the claim of the libelant aforesaid, with costs; and that

2. Monitions issue to the respondents, DEN NORSKE [fol. 11] AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC., which are and may be served within the jurisdiction of this court, and that each of them be required to answer under oath all and singular the matters aforesaid; and

3. That this Honorable Court may be pleased to decree the payment of the amount due as aforesaid to the libelant, as her damages with interest and costs against the respondents as their several liabilities may appear; and

4. That the libelant herein may have such other and further relief in the premises as in law and justice she may be entitled to receive.

/s/ Nathan Baker, Proctor for Libelant, Office & P. O. Address, 1 Newark Street, Hoboken, New Jersey and 401 Broadway (Room 2201), New York City.

Duly sworn to by Olga Skovgaard, jurat omitted in printing.

[fol. 12]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

A. 180-48

NOTICE OF APPEARANCE

Sir:

Please Take Notice that the respondents, Den Norske Afrika-OG Australielinie, Wilhelmsens Dampskibsaktieselskab, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V and A/S Tankfart VI, hereby appear in

this cause and that we are retained as proctors for them. Dated, New York, N.Y., December 3, 1953.

Yours, etc.,

Haight, Deming, Gardner, Poor & Havens, Proctors for Respondents, Den Norske Afrika-OG Australielinie, Wilhelmsens Dampskibsaktieselskab, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, and A/S Tankfart VI, 80 Broad Street, New York 4, N.Y.

To: William V. Connel, Clerk.

Nathan Baker, Esq., Proctor for Libelant, 401 Broadway, New York 13, N.Y.

[fol 13]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

A. 180-48

INTERROGATORIES PROPOUNDED BY THE LIBELANT—
Filed March 22, 1954

Interrogatories propounded by the libelant to the respondents, to be answered in writing and under oath:

1. With reference to the vessel "MV TUNGUS" on December 6, 1952 set forth:

(a) Name and address of the charterer of said vessel on December 6, 1952; the type of charter and the dates during which charter was in effect.

(b) Name and address of the general agent of said vessel on December 6, 1952.

(c) Name and address of the master of said vessel on December 6, 1952, and his present whereabouts and whether presently employed by respondents.

(d) Names and addresses of the first mate, second mate and third mate of said vessel on December 6, 1952, and also their present whereabouts and whether presently employed by respondents.

(e) Name and address and position of the officer who was in actual supervision of the vessel on December 6, 1952.

(f) Name and address of each officer and member of the crew of the "MV TUNGUS" on December 6, 1952, stating his last known address and whether presently employed by respondents and the name of the ship to which presently assigned.

2. Set forth the names and addresses of the officers or members of the ship's crew who were in charge of the "MV TUNGUS" on December 6, 1952.

3. Were any reports, written or oral, made by the captain or any other person attached to the said ship concerning the work being performed on the "MV TUNGUS" or concerning the accident to the libelant's decedent aboard the "MV TUNGUS" on December 6, 1952, stating the names and addresses of the persons making said reports and the present locations of said reports, if written.

4. Were any reports, written or oral, made by the respondents or anyone on their behalf, in the usual course of business concerning the work being performed on the "MV TUNGUS" and concerning the accident to the libelant's decedent on December 6, 1952, stating the names and addresses of the persons making said reports and the present locations of said reports, if written.

5. State the names and addresses of all persons known by respondents or their representatives to have any knowledge of the relevant facts in this case.

[fol. 14] 6. State which of the persons whose names are contained in the answer to interrogatory No. 5 above made written statements to the respondents or anyone on their behalf concerning the accident to libelant's decedent and further, state in whose custody each such written statement reposes.

7. Were any log book entries made concerning the accident to libelant's decedent? If so, in which log or logs do these entries appear?

8. If the answer to the preceding interrogatory is in the affirmative, please state the following:

   (a) When were the log book entries made?

   (b) By whom were the log book entries made?

   (c) Do the entries state the entire occurrence and if so, attach to your answer a verified or photostatic copy of the log book entry.

9. Prior to this suit, did the respondents, directly or through any of their servants, agents or employees, receive notice of an acciden. occurring on board the "MV TUNGUS" during December 6, 1952?

10. If the answer to the prior question is in the affirmative, give the name and address of the person who received the report on behalf of the respondents and the names and addresses and positions of all and any persons who made the said reports to the respondents.

11. What are the names and addresses of all members of the ship's crew who were aboard the vessel, "MV TUNGUS", on December 6, 1952?

12. Were any inspections made of the vessel, "MV TUNGUS" by respondents or by anyone on their behalf on December 6, 1952.

13. If the answer to the prior question is yes, state:

   (a) When each inspection was made.

   (b) Who made each inspection.

   (c) Whether a written report was made of each inspection.

   (d) If written reports were made, repeat them verbatim.

   (e) If oral reports were made, repeat them as accurately as possible.

14. Were any inspections made of the vessel, "MV TUNGUS" by respondents or anyone on their behalf with [fol. 15] in two days after the accident to libelant's decedent?

15. If the answer to the prior question is yes, state:

(a) When each inspection was made.

(b) Who made each inspection.

(c) Whether a written report was made of each inspection.

(d) If written reports were made, repeat them verbatim.

(e) If oral reports were made, repeat them as accurately as possible.

16. Set forth the work being performed by El Dorado Oil Works aboard the "MV TUNGUS" on December 6, 1952.

17. State whether any photographs have been taken by or on behalf of respondents showing methods, conditions, facts or things relative to the allegations of the libel and complaint. If so, state:

(a) The name and address of the person who took such photographs.

(b) What each photograph shows, specifying generally whether it is of the scene of the employment, the materials in use there or injury to decedent.

(c) The date of the taking of such photographs.

(d) The name and address of the person having custody of each photograph.

(e) The name and address of the person having custody of the negatives.

18. Set forth the names and addresses of all witnesses to the accident to libelant's decedent known to respondents or their attorneys.

19. Set forth the name and address of all persons upon whom the respondents will rely at the trial of this action.

20. State the time of day on December 6, 1952, when the "MV TUNGUS" docked at the 22nd Street Pier, Bayonne, New Jersey.

21. Set forth the names and addresses and positions of the persons who removed the hatch covers and beams from the port aft tank of the "MV TUNGUS" on December 6, 1952.

22. Set forth the name, address and position of the per-
[fol. 16] son who supervised the discharging of the cargo from the port aft tank of the "MV TUNGUS" on December 6, 1952.

23. Set forth the name and address and position of the person who supervised the removal of the hatch covers and beams from the port aft tank of the "MV TUNGUS" on December 6, 1952.

24. Were any statements made by the master, officers and crew of the "MV TUNGUS" prior to the institution of this suit concerning the work being performed and concerning the accident to libelant's decedent aboard the "MV TUNGUS" on December 6, 1952?

Dated: New York, New York
March 18, 1954

/s/ Nathan Baker

To: Haight, Deming, Gardner, Poor & Havens, Proctors for Respondents, Den Norske Afrika-OG Australielinie, Wilhelmsens Dampskibsaktieselskab, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, and A/S Tankfart VI, 80 Broad Street, New York 4, N. Y.

[fol. 16b] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A. 180-48

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, Libelant,

—against—

The vessel m/v TUNGUS, her boilers, etc., and DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMPSKIBSAKTIESELSKAB, et al., Respondents,

—and—

EL DORADO OIL WORKS, Respondent-Impleaded.

INTERROGATORIES PROPOUNDED BY THE RESPONDENTS TO THE LIBELANT AND HER PROCTORS, TO BE ANSWERED IN WRITING AND UNDER OATH—Filed June 22, 1954

1. State the date of birth of Olga Skovgaard.

2. State the date of birth of Carl E. Skovgaard.

3. State the date of the marriage of Olga Skovgaard to Carl E. Skovgaard.

4. State the date of birth of Mary Elizabeth Skovgaard.

5. State the date of birth of Carolyn Skovgaard.

6. State the date of birth of Christine Skovgaard.

[fol. 16c] 7. State by whom Carl E. Skovgaard was employed on December 6, 1952.

8. State when Carl E. Skovgaard was first employed by El Dorado Oil Works.

9. State whether Carl E. Skovgaard was regularly employed by El Dorado Oil Works from the date referred to in interrogatory No. 8 to December 6, 1952.

10. State the title of and the nature of the job or position held by Carl E. Skovgaard with his employer, El Dorado Oil Works, on December 6, 1952.

11. State what other jobs or positions were held by Carl E. Skovgaard with El Dorado Oil Works since his first employment by that company.

12. State what other companies or individuals Carl E. Skovgaard had been employed by since January 1, 1947, if any.

13. State the amount of money earned by Carl E. Skovgaard in each of the years 1950, 1951 and 1952.

14. State what part of that income for each of the years 1950, 1951 and 1952 was derived from employment by El Dorado Oil Works.

15. State what the regular hours of employment of Carl E. Skovgaard were in November and December, 1952.

16. State at what time Carl E. Skovgaard reported for work with El Dorado Oil Works on December 5, 1952.

17. State at what time on December 5, 1952, or on December 6, 1952, Carl E. Skovgaard first participated in the operation of discharging cocoanut oil from the m/v [fol. 16d] Tungus.

18. State at what time on December 5, 1952, or December 6, 1952, Carl E. Skovgaard first went aboard the m/s (sic) Tungus.

19. State for what purpose Carl E. Skovgaard first went aboard the m/v Tungus.

20. State who first ordered Carl E. Skovgaard to go aboard the m/v Tungus on December 5, 1952, or December 6, 1952.

21. State whether Carl E. Skovgaard was present aboard the m/v Tungus at the time the port deeptank in No. 3 hatch was first opened.

22. State whether Carl E. Skovgaard was present at any time during the installation of El Dorado Oil Works' dis-

charging pump in the 'tween deck of No. 3 hatch of the m/v Tungus on December 5, 1952.

23. If so, state the nature of the duties performed by Carl E. Skovgaard during that installation.

24. State whether Carl E. Skovgaard was aboard that m/v Tungus on more than one occasion on December 5 or December 6, 1952.

25. State the nature of the duties performed by Carl E. Skovgaard aboard the m/v Tungus on December 5 or December 6, 1952.

26. State the total period of time during which Carl E. Skovgaard was aboard the m/v Tungus on December 5 and December 6, 1952.

27. State the nature of the duties being performed by [fol. 16e] Carl E. Skovgaard at the time he was ordered to report aboard the m/v Tungus and prior to his reporting aboard that vessel.

28. State in what respects it is claimed that the m/v Tungus was unseaworthy, as alleged in Article Ninth of the libel.

29. State in what respects the respondents, their agents, servants and employees, were negligent, careless or reckless as alleged in Article Sixteenth of the libel.

30. State in what manner the negligence, carelessness and recklessness referred to in the answer to interrogatory No. 29 contributed to or caused the death of the deceased, Carl E. Skovgaard.

31. State in what respects the m/v Tungus was unseaworthy and unsafe as alleged in Article Seventeenth of the libel.

32. State in what respects Carl E. Skovgaard was injured, bruised, wounded and rendered sick, sore, lame, disabled and permanently injured, as alleged in Article Twenty-sixth of the libel.

33. State the period of time in days, hours and minutes during which it is claimed that Carl E. Skovgaard was

injured, bruised and wounded and rendered sick, sore, lame, disabled and permanently injured and prevented from attending to his usual work, as alleged in Article Twenty-sixth of the libel.

34. State what sums of money were expended and to whom in an effort to cure Carl E. Skovgaard of his injuries, as alleged in Article Twenty-sixth of the libel.

[fol. 16f] 35. State the period of time in days, hours and minutes during which Carl E. Skovgaard endured great pain and suffering prior to his death on December 6, 1952, as alleged in Article Twenty-sixth of the libel.

36. State in what respects Carl E. Skovgaard was injured, bruised and wounded and rendered sick, sore, lame and disabled and permanently injured, as alleged in Article Thirty-first of the libel.

37. State the period of time in days, hours and minutes during which it is claimed that Carl E. Skovgard (sic) was injured, bruised and wounded and rendered sick, sore, lame and disabled and was permanently injured, and the period of time in days, hours and minutes during which Carl E. Skovgaard was prevented from attending to his usual work, as alleged in Article Thirty-first of the libel.

38. State what sums of money were expended in an effort to cure Carl E. Skovgaard of his injuries, as alleged in Article Thirty-first of the libel.

39. State the period of time in days, hours and minutes during which Carl E. Skovgaard endured great pain and suffering prior to his death on December 6, 1952, as alleged in Article Thirty-first of the libel.

40. State what Labor Union or Labor Unions Carl E. Skovgaard was a member of on December 5 and December 6, 1952.

41. State how long Carl E. Skovgaard had been a member of that Union or Unions.

42. State what other Labor Unions Carl E. Skovgaard had been a member of in the years 1947 through 1952.

[fol. 16g] 43. State the amount of the income referred to in interrogatory No. 13 which Carl E. Skovgaard contributed to his wife and three children for their support after payment of taxes, both state and federal, for the years 1950, 1951 and 1952.

44. State whether Olga Skovgaard, Mary Elizabeth Skovgaard, Carolyn Skovgaard or Christine Skovgaard were gainfully employed in the years 1950, 1951 or 1952.

45. If so, state by whom and state as well the total earnings of each such person for each of such years.

46. State whether any of the persons referred to in interrogatory No. 44 has been gainfully employed in the years 1953 or 1954.

47. If so, state by whom employed, for what period of time employed and state as well the amount earned during each of such periods of employment.

48. State the name and address and position of the person who was in actual supervision of the discharging of the cocoanut oil aboard the m/v Tungus on behalf of El Dorado Oil Works on December 5 and December 6, 1952.

49. State the names and addresses of those persons who were assisting Carl E. Skovgaard in tending, overhauling or repairing the electric discharge pump of El Dorado Oil Works in the 'tween deck of No. 3 hatch of the m/v Tungus on December 5 or December 6, 1952.

50. State the names and addresses of all persons who were present when the libelant was caused to fall into the hold, resulting in his death on December 6, 1952, as alleged in Article Ninth of the libel.

[fol. 16h] 51. State the names and addresses of all persons known to the libelant or her proctors to have any knowledge of the relevant facts in this matter.

52. State which of the persons whose names are contained in the answer to interrogatory No. 51 above made written statements to the libelant or to anyone on her behalf concerning the accident to Carl E. Skovgaard, and,

if so, state in whose custody each of such written statements repose.

53. State the name and address of the employee of El Dorado Oil Works under whose immediate supervision Carl E. Skovgaard was working on December 5, 1952, or December 6, 1952, aboard the m/v Tungus.

54. State the names and addresses of all persons upon whom the libelant or her proctors will rely at the trial of this action.

55. Set forth the names and addresses of all witnesses to the accident described in the libel known to libelant, Olga Skovgaard, or her proctors.

56. Prior to this action, did the libelant, Olga Skovgaard, receive any notice or report with respect to the death of Carl E. Skovgaard on board the m/v Tungus on December 6, 1952?

57. If the answer to the prior interrogatory is in the affirmative, give the names and addresses and positions of any and all persons who made the said reports or gave the said notices to the libelant, Olga Skovgaard.

Dated: New York, N.Y., June 21, 1954.

Haight, Deming, Gardner, Poor & Havens, Proctors for Respondents, By /s/ J. Ward O'Neill, A member of the Firm, 80 Broad Street, New York, N.Y.

To: Nathan Baker, Esq., Proctor for Libelant, 1 Newark Street, Hoboken, New Jersey.

[fol. 17]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANSWER BY RESPONDENT—Filed January 11, 1954

The answer of DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMENS (sic) DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, respondents to the libel of OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, Deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, Deceased, in a cause of action in tort for damages for personal injuries, civil and maritime, alleges upon information and belief:

Answering the First Cause of Action:

First: Denies knowledge or information sufficient to form a belief as to the allegations contained in article First of the libel.

Second: Denies knowledge or information sufficient to form a belief as to the allegations contained in article Second of the libel.

Third: Denies that the m/v Tungus is now within the port of New York and within the jurisdiction of this Honorable Court and denies knowledge or information sufficient to form a belief as to whether the m/v Tungus will be during the pendency of this action found within the port of New York and within the jurisdiction of this Honorable Court, and except as so specifically admitted, denies each and every allegation contained in article Third of the libel.

Fourth: Admits that the respondent, Den Norske Afrika-OG Australielinie, Wilhelmsens Dampskibsaktieselskab. A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, and A/S Tankfart VI were and still are foreign corporations, but except as so specifically admitted, denies each and every allegation contained in article Fourth of the libel.

Fifth: Admits the allegations contained in article Fifth [fol. 18] of the libel.

Sixth: Admits that at all times mentioned in the libel, the respondents, Den Norske Afrika-OG Australielinie, Wilhelmsens Dampskibsaktieselskab, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V and A/S Tankfart VI were the owners of the m/v Tungus and were in possession of and operated, managed and controlled the m/v Tungus, except for those parts and portions of the vessel turned over to repair men, stevedores, or other independent contractors for the purposes of loading or discharging, including those parts and portions complained of in the libel, and except as so specifically admitted, denies each and every allegation contained in article Sixth of the libel.

Seventh: Denies each and every allegation contained in article Seventh of the libel.

Eighth: Denies each and every allegation contained in article Eighth of the libel.

Ninth: Denies each and every allegation contained in article Ninth of the libel.

Tenth: Denies each and every allegation contained in article Tenth of the libel.

Eleventh: Admits the allegations contained in article Eleventh of the libel.

Twelfth: Admits that at all times mentioned in the libel there was in force in the State of New Jersey a death statute which was in force and effect at all times mentioned in the libel, which said statute is Chapter 31 of Title 2A of the Revised Statutes of New Jersey, sections 1 through 6 inclusive, but denies the applicability thereof, and except as so specifically admitted, denies each and every allega- [fol. 19] tion contained in article Twelfth.

Thirteenth: Denies each and every allegation contained in article Thirteenth of the libel.

Fourteenth: Denies each and every allegation contained in article Fourteenth of the libel.

Answering the Second Cause of Action:

Fifteenth: Respondents repeat and reallege each and every admission, denial and denial of knowledge or information herein above set forth in this answer with the same force and effect as if herein repeated and set forth at length.

Sixteenth: Denies each and every allegation contained in article Sixteenth of the libel.

Seventeenth: Denies each and every allegation contained in article Seventeenth of the libel.

Eighteenth: Denies each and every allegation contained in article Eighteenth of the libel.

Nineteenth: Admits each and every allegation contained in article Nineteenth of the libel.

Twentieth: Admits that at all times mentioned in the libel there was in force in the State of New Jersey a death statute which was in force and effect at all times mentioned in the libel, which said statute is Chapter 31 of Title 2A of the Revised Statutes of New Jersey, sections 1 through 6 inclusive, but denies the applicability thereof, and except as so specifically admitted, denies each and every allegation contained in article Twentieth.

Twenty-first: Denies each and every allegation contained in article Twenty-first of the libel.

Twenty-second: Denies each and every allegation con-
[fol. 20] tained in article Twenty-second of the libel.

Answering the Third Cause of Action:

Twenty-third: Denies knowledge or information sufficient to form a belief as to the allegations contained in article Twenty-third of the libel.

Twenty-fourth: Denies knowledge or information sufficient to form a belief as to the allegations contained in article Twenty-fourth of the libel.

Twenty-fifth: Respondents repeat and reallege each and every admission, denial and denial of knowledge or infor-

mation hereinabove set forth in this answer with the same force and effect as if herein repeated and set forth at length.

Twenty-sixth: Denies each and every allegation contained in article Twenty-sixth of the libel.

Answering the Fourth Cause of Action:

Twenty-seventh: Denies knowledge or information sufficient to form a belief as to the allegations contained in article Twenty-seventh of the libel.

Twenty-eighth: Denies knowledge or information sufficient to form a belief as to the allegations contained in article Twenty-eighth of the libel.

Twenty-ninth: Respondents repeat and reallege each and every admission, denial and denial of knowledge or information hereinabove set forth in this answer with the same force and effect as if herein repeated and set forth at length.

Thirtieth: Respondents repeat and reallege each and every admission, denial and denial of knowledge or information hereinabove set forth in this answer with the same force and effect as if herein repeated and set forth [fol. 21] at length.

Thirty-first: Denies each and every allegation contained in article Thirty-First of the libel.

Further Answering the Libel and for a First, Separate, Partial and/or Complete Defense, Respondents Allege Upon Information and Belief, as Follows:

Thirty-second: That if the deceased, Carl E. Skovgaard, suffered any injuries, the same were caused or contributed to by the negligence of said deceased and/or by the negligence of the fellow servants of said deceased, the employees of El Dorado Oil Works, for whose actions respondents are not liable.

Further Answering the Libel and for a Second, Separate, Partial and/or Complete Defense, Respondents Allege Upon Information and Belief, as Follows:

Thirty-third: That the deceased's, Carl E. Skovgaard's, employment had certain risks incident thereto which were obvious and well known to the deceased at all the times of the said employment and also when the deceased first entered thereon, and that said risks were assumed by the deceased; that whatever injuries deceased received in said employment and which are complained of by the libelant herein, are those from and were caused by said risks, all of which were taken and assumed by the deceased at the time he entered upon said employment and during the continuance thereof.

Wherefore, respondents demand judgment dismissing the libel herein, together with the costs and disbursements of this action and that the respondents may have such other and further relief as to this Court may seem just and proper.

[fol. 22] Haight, Deming, Gardner, Poor & Havens, Proctors for Respondents, Den Norske Afrika-OG Australielinie, Wilhelmsens Dampskibsaktieselskab, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V and A/S Tankfart VI, 80 Broad Street, New York 4, N.Y.

State of New York,
County of New York, *ss.*:

J. WARD O'NEILL, being duly sworn, deposes and says:

I am a member of the firm of Haight, Deming, Gardner, Poor & Havens, proctors for respondents, Den Norske Afrika-OG Australielinie, Wilhelmsens Dampskibsaktieselskab, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V and A/S Tankfart VI,

I have read the foregoing answer and know the contents thereof and the same is true to the best of my knowledge, information and belief.

The reason this verification is made by the deponent and not by the said respondents is that Den Norske Afrika-OG Australielinie, Wilhelmsens Dampskibsaktieselskab, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V and A/S Tankfart VI are foreign corporations not having an officer thereof within the jurisdiction of this Honorable Court.

/s/ J. Ward O'Neill

[Jurat]

[fol. 23]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

A. 180-48

RESPONDENTS' PETITION FOR INTERPLEADER—
Filed January 11, 1954

The Petition of DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, respondents impleading EL DORADO OIL WORKS in the above captioned cause as party respondent, alleges upon information and belief as follows:

First: That at all times hereinafter mentioned, the petitioners, Den Norske Afrika-og Australielinie Wilhelmsens Dampskibsaktieselskab, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V and A/S Tankfart VI, are foreign corporations, organized and existing under and by virtue of the laws of the Kingdom of Norway, and not having an office within the jurisdiction of this Honorable Court.

Second: That at all times hereinafter mentioned the respondent-impleaded, El Dorado Oil Works, was and is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 27 William Street, Borough of Manhattan, County of New York, State of New York, and

with a further place of business at the foot of East 30th Street, Bayonne, State of New Jersey.

Third: That on or about November 5, 1953, a libel was filed in this Court by Olga Skovgaard, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and Olga Skovgaard, Administratrix of the estate of Carl E. Skovgaard, deceased, to recover the sum of $500,000 for the death of Carl E. Skovgaard on or about [fol. 24] December 6, 1952, while employed by El Dorado Oil Works aboard the m/v Tungus while that vessel was docked at the foot of 22nd Street, Bayonne, New Jersey.

Fourth: That it is alleged in the aforesaid libel, filed in the United States District Court for the Southern District of New York, admiralty 180-48, as follows:

[Allegations of Libel repeated.]

Fifth: That at the time of the happening of the events mentioned in the libel, El Dorado Oil Works, its agents, servants, and employees, were engaged pursuant to a contract in discharging coconut oil from the m/v Tungus and for that purpose, El Dorado Oil Works employed, among others, the deceased, Carl E. Skovgaard.

Sixth: During the time of the performance of the work covered by said contract and at the time of the happening of the events mentioned in the libel, the respondents herein had given to El Dorado Oil Works, its agents, servants and employees, custody and control of the necessary parts of the vessel and the appliances thereof which were incident and necessary to the work being done by El Dorado Oil Works, which necessary parts and appliances included those complained of in the libel.

Seventh: That at the time of the delivery of custody and control by respondents herein to El Dorado Oil Works, its agents, servants and employees, the said parts and appliances of the m/v Tungus so delivered by the respondents were in a reasonably safe condition and proper for the use thereof by the agents, servants and employees of El Dorado Oil Works, which necessary parts and appliances included those complained of in the libel.

Eighth: That by reason of the aforesaid contract it was [fol. 25] the duty of El Dorado Oil Works, its agents, servants and employees, to act with reasonable care and prudence in performing the necessary work and to properly supervise the work that was being done and to avoid the creation of dangerous conditions at the places on the vessel where the work was being done and to eliminate such dangerous conditions as might be discovered by the exercise of reasonable care and inspection.

Ninth: That during the time of the performance of the work covered in said contract and at the time of the happening of the events mentioned in the libel, in which work no officers or members of the crew of the m/v Tungus were engaged or helping, El Dorado Oil Works, its agents, servants and employees, failed in the exercise of reasonable care and diligence and failed to fulfill the duties evolving upon them by virtue of their status aboard the m/v Tungus in that, among other things, they specifically (a) failed to properly supervise and direct the performance of the work, (b) failed to properly use the appliances and parts of the vessel afforded to them by the respondents, (c) failed to take adequate precautions for the safety of their employees and (d) were otherwise careless and negligent in the premises.

Tenth: That at the time the custody and control of those parts and portions of the vessel mentioned in the libel were turned over to El Dorado Oil Works for the purpose of discharging the said cargo, the said parts, portions and appliances thereof were in fact in a seaworthy condition and safe for the use thereof by the libelant and the other agents, servants and employees of El Dorado Oil Works.

Eleventh: That in view of the foregoing, it is plain that [fol. 26] the injuries complained of in the libel are improperly alleged as the fault of the respondents and were actually the fault of El Dorado Oil Works, its agents, servants and employees, due to the various failures to comply with the duties evolving upon it and its further failure heretofore enumerated in this impleading petition.

Twelfth: That upon the above facts, which will be established upon the trial, it is clear that El Dorado Oil

Works, should be made a party to this suit and added as a respondent-impleaded herein inasmuch as with the establishment of said facts, it will be clear that if the injuries were sustained in the manner alleged by the libelant in the libel, the conditions causing the injuries and death of the deceased were actually created by El Dorado Oil Works, which had custody and control of those parts, portions and appliances of the m/v Tungus mentioned in the libel.

Thirteenth: That if the libelant suffered any damages herein, he is entitled to any recovery against respondent by reason of the matters alleged in the libel, which liability the respondents deny, it is by reason of the fault and neglect of the respondent-impleaded, El Dorado Oil Works, its agents, servants and employees and because of the failure of said El Dorado Oil Works to perform the obligations resting upon it in the performance of its work pursuant to the contract for the performance of said work, and if liability for said damages should be adjudged in favor of the libelant and against the respondents, then the respondents should be entitled to indemnity from the respondent-impleaded, El Dorado Oil Works, in respect thereof and all such liabilities should be borne by El Dorado Oil Works and not by the respondent.

Fourteenth: That all and singular the premises are [fol. 27] true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, petitioners pray:

1. That process in due form of law, according to the rules and practices of this Court, may be issued against El Dorado Oil Works, citing it to appear in answer on oath the libel herein and this petition, and that the said El Dorado Oil Works may be proceeded against in this suit for the damage claimed in the libel, and that the liability, if any, of the respective parties under said libel and under this petition may be adjudged and determined in this proceeding.

2. In case the said El Dorado Oil Works cannot be found within this district, then that all goods, chattels and credits

belonging to it within this district and particularly those in the hands of the Pacific Vegetable Oil Corporation, c/o Davies Turner, 8-10 Bridge Street, New York, N. Y., in the hands of Socony Vacuum Oil Co., 26 Broadway, New York, N. Y., and in the hands of Proctor and Gamble Manufacturing Co., 17 Battery Place, New York, N. Y., may be attached by process of foreign attachment in the amount of $500,000, the sum sued for in the libel, with interest and costs and disbursements of the libelant and the petitioner.

3. That the Court may grant to the respondents such other, further or different relief as the justice of the cause may require.

Haight, Deming, Gardner, Poor & Havens

[fol. 28a]
State of New York,
County of New York, ss.:

J. Ward O'Neill, being duly sworn, deposes and says:

I am a member of the firm of Haight, Deming, Gardner, Poor & Havens, proctors for respondents, Den Norske Afrika-OG Australienlinie, Wilhelmsens Dampskibsaktieselskab, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart Vi, (sic) and A/S Tankfart VI; I have read the foregoing impleading petition and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

The reason this verification is made by the deponent and not by the said respondents is that Den Norske Afrika-OG Australielinie, Wilhelmsens Dampskibsaktieselskab, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, and A/S Tankfart VI are foreign corporations not having an officer thereof within the jurisdiction of this Honorable Court.

/s/ J. Ward O'Neill

[Jurat]

[fol. 28b] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A. 180-48

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the estate of Carl E. Skovgaard, deceased, Libelant,

—against—

The vessel "m/v TUNGUS," her boilers, engines, tackle, apparel and furniture,

—and against—

DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC., Respondents.

ORDER TRANSFERRING CAUSE FROM U.S.D.C. FOR THE SOUTHERN DISTRICT OF NEW YORK TO U.S.D.C. FOR THE DISTRICT OF NEW JERSEY—January 5, 1955

This cause having come on to be heard on December 21, 1954 before the Honorable Archie O. Dawson, U.S.D.J., on motion of the respondents for an order of this court transferring the venue of this proceeding to the United States District Court for the District of New Jersey, and Haight, Deming, Gardner, Poor & Havens, proctors for respondents, David P.H. Watson, of Counsel, having appeared in support of said motion, and Nathan Baker, proctor for libelant, having appeared in opposition thereto, and the Court, after due deliberation, and after considering the affidavits submitted in support of said motion and the affidavit submitted in opposition thereto, having decided that said motion should be granted and having endorsed a

memorandum to that effect, dated December 22, 1954, on the original motion papers, it is

[fol. 28c] Now, on motion of Haight, Deming, Gardner, Poor & Havens, proctors for respondents, ordered, adjudged, and decreed that the venue of this proceeding be and the same hereby is transferred from this Court to the United States District Court for the District of New Jersey.

Archie O. Dawson, U.S.D.J.

Dated: New York, N.Y., January 5, 1955

[fol. 29]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NOTICE OF APPEARANCE AND DEMAND

Sir:

Please Take Notice, that the respondents, The vessel "m/v Tungus" her boilers, engines, tackle, apparel and furniture and Den Norske Afrika-OG Australielinie Wilhelmsens dampskibsaktieselskab, a/s Tonsberg, a/s Tankfart I, a/s Tankfart IV, a/s Tankfart V, a/s Tankfart VI, and Barber Steamship Lines, Inc., hereby appear in the above entitled action, and that we are retained as Attorneys for them therein, and demand that a copy of all papers in this action be served on us at our offices, No. 1 Exchange Place, Jersey City 2, New Jersey.

Dated, January 27th 1955.

Yours, &C.,

/s/ McAleer, Connell & Corridon, /s/ By James D. Connell, Attorneys for Respondents.

To: Nathan Baker, Esq., 1 Newark Street, Hoboken. N. J.

[fol. 30] APPEARANCE

The clerk will enter my appearance for the Respondent-Impleaded, El Dorado Oil Works.

/s/ Wilbur A. Stevens, Proctor for Respondent-Impleaded, 60 Park Place, Newark, N. J.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civ. 12-55

ANSWER TO IMPLEADING PETITION—Filed March 4, 1955

The answer of EL DORADO OIL WORKS, the Respondent-Impleaded to the Impleading Petition of DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, in a cause of action civil and maritime, alleges, on information and belief, as follows:

First: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article First of the Impleading Petition.

Second: It admits that the Respondent-Impleaded, El Dorado Oil Works, is a corporation with a place of business at the foot of East 30th Street, Bayonne, State of New [fol. 31] Jersey. It denies all the other matters alleged in Article Second of the Impleading Petition.

Third: It admits that on or about November 5, 1953, a libel was filed in the United States District Court for the Southern District of New York by Olga Skovgaard, as Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased and by Olga Skovgaard, as Administratrix of the estate of Carl E. Skovgaard, to recover the sum of $500,000 for the death of Carl E. Skovgaard on or about December 6, 1952, aboard the M/V TUNGUS. It

admits that the said Carl E. Skovgaard, deceased, had been employed by the Respondent-Impleaded. It denies that it has any knowledge or information thereof sufficient to form a belief as to all the other matters alleged in Article Third of the Impleading-Petition.

Fourth: It admits the matters alleged in Article Fourth of the Impleading Petition.

Fifth: It admits that at the time of the happening of some of the events mentioned in the Impleading Petition, El Dorado Oil Works, by its agents, servants and employees, was engaged in discharging cocoanut oil from the M/V TUNGUS, and for that purpose employed, amongst others, the deceased, Carl E. Skovgaard. It denies that it has any knowledge or information thereof sufficient to form a belief as to all the other matters alleged in Article Fifth of the Impleading Petition.

Sixth: It denies all the matters alleged in Article Sixth of the Impleading Petition.

Seventh: It denies all the matters alleged in Article Seventh of the Impleading Petition.

[fol. 32] Eighth: It denies all the matters alleged in Article Eighth of the Impleading Petition.

Ninth: It denies all the matters alleged in Article Ninth of the Impleading Petition.

Tenth: It denies all the matters alleged in Article Tenth of the Impleading Petition.

Eleventh: It denies all the matters alleged in Article Eleventh of the Impleading Petition.

Twelfth: It denies all the matters alleged in Article Twelfth of the Impleading Petition.

Thirteenth: It denies all the matters alleged in Article Thirteenth of the Impleading Petition.

Fourteenth: It admits that all and singular the premises are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

As a First Separate and Complete Defense

Fifteenth: That on or about February 18th, 1953 Libelant filed with the Department of Labor and Industry a dependency Claim Petition, claiming the benefits of the provisions of Title 34, Chapter 15 of the Revised Statutes of the State of New Jersey commonly referred to as the Workmen's Compensation Act.

Sixteenth: That on August 4th, 1953 a Determination, Award and Rule for Judgment was entered in the said Department of Labor and Industry in the Division of Workmen's Compensation as follows:—

New Jersey Department of Labor and Industry
Division of Workmen's Compensation
Claim Petitions Nos. B26725, B28722

[fol. 33] Olga Skovgaard, Representative of Carl Skovgaard, deceased,

and

Catherine Cuthbert, Representative of William Cuthbert, a minor, Petitioners,

vs.

El Dorado Oil Company, Respondent.

Determination, Award and Rule for Judgment

Appearances:

John J. Lenken, Attorney for Petitioner Olga Skovgaard, Alfred M. James, Attorney for Petitioner Catherine Cuthbert.

Cox & Walburg by Arthur F. Mead, Attorney for Respondent.

Statement of Award

Assessed Against Respondent:

To petitioner Olga Skovgaard for self and three infants, $22.50 per week to April 23, 1962, $11,700.00; from April 23, 1962 to May 12, 1969 $25.00 per week, $8,400, total	$20,100.00
To petitioner Catherine Cuthbert for William Cuthbert, $2.50 per week until April 23, 1962	$ 1,300.00
To John J. Lemken, Esq., Petitioner's Attorney, Counsel Fee	$ 500.00
To Alfred M. James, Esq., Petitioner's Attorney, Counsel Fee	$ 100.00
Assessed Against Petitioner, Olga Skovgaard:	
To John J. Lemken, Esq., Petitioner's Attorney, Counsel	$ 100.00

A formal petition having been duly filed, claiming compensation under Article 2, Chapter fifteen, Title 34 of the Revised Statutes, its supplements and amendments, an answer having been filed, and the parties having appeared before me, Stephen J. Lorenz, Deputy Director of Workmen's Compensation, at the Division of Workmen's Compensation, Jersey City, on July 28th and 30th, 1953, and testimony having been presented on the issues involved and stipulations having been [fol. 34] entered on the record, counsel for the petitioner Olga Skovgaard and counsel for the petitioner Catherine Cuthbert having appeared and stipulated that both petitions should be consolidated for the purpose of trial and counsel for both petitioners further agreeing to the following stipulations.

It is stipulated that the deceased did die as a result of an accident which arose out of and during the course of his employment. The deceased left him surviving a widow, Olga, and three children, namely, Mary Elizabeth Skovgaard, age 14, born June 11, 1939; Carolyn

Skovgaard, age 11, born July 21, 1942; Christine Skovgaard, age 2, born May 12, 1951.

It is further stipulated that the deceased did plead guilty to the charge of fathering an illegitimate, one William Cuthbert, born March 24, 1944.

It is further stipulated that the salary of the deceased was such so as to entitle him to the maximum compensation rate. All the above were dependents of the deceased under the Act at the time of his death. Maximum compensation rate if (sic) $25.00.

The sole question before the court was whether or not the New Jersey Department of Labor has jurisdiction. I make these determinations, namely, that the deceased was not in any way connected with the operation of the ship but rather was repairing the respondent's pump when he was killed. I find, therefore, that the New Jersey Department of Labor has jurisdiction in the matter of both these petitions.

I find and determine as follows:

1. The deceased was in the employ of the respondent on December 6, 1952, on which date he sustained personal injuries which resulted in his death. The accident occurred while the deceased was engaged in repairing a suction pump between decks. He was catapulted into the hold of the M. S. Tungus and was drowned.

2. The Respondent had due and timely notice and actual knowledge thereof.

3. The deceased's wages were a maximum and entitle his representative to the maximum compensation rate of $25.00 per week.

4. Compensation shall be paid by the respondent under said statute.

5. Payments shall be made as set forth in Statement of Award.

6. The accident results in the death of the employee whose representative herein seeks compensation.

[fol. 35] 7. In the matter of distribution, it becomes necessary to divide $25.00 between a widow and three children and Catherine Cuthbert, the mother of the alleged illegitimate. After a conference with the three counsel, I apportioned $22.50 a week for Olga and her three children until such time as William Cuthbert, the alleged illegitimate becomes 18 years of age, to wit. April 24, 1962. Until that date, Catherine Cuthbert, the representative of the infant William Cuthbert, will receive $2.50 per week. After April 24, 1962, Olga Skovgaard, the representative of the infant, Christine Skovgaard, shall then receive the sum of $25.00 per week until May 12, 1969, at which Christine shall become of age and payments under this order shall cease.

At the conclusion of the trial I made certain observations and findings which were recorded and which are made a part hereof as if set forth fully herein.

Pursuant to such findings, judgment is entered in accordance with the above Statement of Award.

Pursuant to the provisions of section 34:15-64, as amended, it is directed that amounts to be deducted for the petitioner's expenses are to be paid to the persons entitled to the same, the remainder to be paid directly to the petitioner.

(signed) Stephen J. Lorenz, Deputy Director of Workmen's Compensation.

Dated: August 4, 1953.

Seventeen: That the Respondent-Impleaded, EL DORADO OIL WORKS, has complied with the terms of the said determination and has paid and continues to pay in accordance with the terms of said Award, and has, therefore, extinguished its obligation to the Libelant and all others claiming through her, in accordance with the provisions of said Rule for Judgment entered under the authority of said Workmen's Compensation Act, which provides in part as follows:

"34:15-8. Election surrender of other remedies.

Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all the [fol. 36] provisions of this article, and shall bind the employee himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency."

As a Second Separate and Complete Defense

Eighteen: That the Impleading Petition fails to state a claim upon which relief can be granted.

Wherefore, Respondent-Impleaded, EL DORADO OIL WORKS, demands that the Impleading Petition be dismissed with costs to the Respondent-Impleaded and that the Court will grant to the Respondent-Impleaded such other further and different relief as the justice of the cause may require.

Kirlin, Campbell & Keating, Counsel to Wilbur A. Stevens, Esq., Proctor for Respondent-Impleaded. Office and P. O. Address: 120 Broadway, New York 5, N. Y.

[fol. 37]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civ. 12-55

ANSWER TO LIBEL BY RESPONDENT-IMPLEADED—Filed March 4, 1955

The answer of EL DORADO OIL WORKS, Respondent-Impleaded, to the libel and complaint of OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skov-

gaard, deceased, against the vessel "MV TUNGUS", her boilers, etc., and against DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMP-SKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANK-FART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC., in a cause of action, civil and maritime, alleges, on information and belief, as follows:

As to the First Cause of Action.

First: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article First of the libel.

Second: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Second of the libel.

Third: It denies that it has any knowledge or information [fol. 38] thereof sufficient to form a belief as to all the matters alleged in Article Third of the libel.

Fourth: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Fourth of the libel.

Fifth: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Fifth of the libel.

Sixth: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Sixth of the libel.

Seventh: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Seventh of the libel.

Eighth: It admits that on or about December 6, 1952, libelant's intestate was in the employ of El Dorado Oil Works, performing work aboard the M/V TUNGUS while that vessel was in navigable waters of the United States, docked at the foot of 22nd Street, Bayonne, New Jersey.

It denies that it has any knowledge or information thereof sufficient to form a belief as to all the other matters alleged in Article Eighth of the libel.

Ninth: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Ninth of the libel.

Tenth: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Tenth of the libel.

Eleventh: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the [fol. 39] matters alleged in Article Eleventh of the libel.

Twelfth: It admits the matters alleged in Article Twelfth of the libel.

Thirteenth: It denies all the matters alleged in Article Thirteenth of the libel.

Fourteenth: It admits that all and singular the premises are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. It denies all the other matters alleged in Article Fourteenth of the libel.

As to the Second Cause of Action

Fifteenth: Respondent-impleaded, El Dorado Oil Works, repeats and realleges each and every answer and denial contained in Articles First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth of this answer with the same force and effect as if herein again set forth at length, and, in addition thereto, alleges:

Sixteenth: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Sixteenth of the libel.

Seventeenth: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Seventeenth of the libel.

Eighteenth: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Eighteenth of the libel.

Nineteenth: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Nineteenth of the libel.

[fol. 40] Twentieth: It admits the matters alleged in Article Twentieth of the libel.

Twenty-first: It denies all the matters alleged in Article Twenty-first of the libel.

Twenty-second: It admits that all and singular the premises are within the admiralty and maritime jurisdiction of the United States of America and of this Honorable Court. It denies all the other matters alleged in Article Twenty-second of the libel.

As to the Third Cause of Action

Twenty-third: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Twenty-third of the libel.

Twenty-fourth: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Twenty-fourth of the libel.

Twenty-fifth: Respondent-impleaded El Dorado Oil Works, repeats and realleges each and every answer and denial contained in Articles Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth of this answer with the same force and effect as if herein again set forth at length; and, in addition thereto, alleges:

Twenty-sixth: It denies all the matters alleged in Article Twenty-sixth of the libel.

As to the Fourth Cause of Action

Twenty-seventh: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters alleged in Article Twenty-seventh of the libel.

Twenty-eighth: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the

[fol. 41] matters alleged in Article Twenty-eighth of the libel.

Twenty-ninth: Respondent-impleaded El Dorado Oil Works, repeats and realleges each and every answer and denial contained in Articles Third, Fourth, Fifth, Sixth, Seventh and Eighth of this answer with the same force and effect as if herein again set forth at length.

Thirtieth: Respondent-impleaded El Dorado Oil Works, repeats and realleges each and every answer and denial contained in Articles Sixteenth and Seventeenth of this answer with the same force and effect as if herein again set forth at length; and, in addition thereto, alleges:

Thirty-first: It denies all the matters alleged in Article Thirty-first of the libel.

As a First Separate and Complete Defense

Thirty-second: That, if the libelant's intestate received any injuries and/or illness, as alleged in the libel, said injuries and/or illness were caused in whole or in part by libelant's intestate's own negligence and were not caused or contributed to in any manner by any negligence of the Respondent-Impleaded.

As a Second Separate and Complete Defense

Thirty-third: That the injuries and/or illness to the libelant's intestate, if any, arose out of certain risks, dangers and hazards, all of which were open and obvious and well-known to the libelant's intestate at and before the said injuries and/or illness were sustained, and all of said risks, dangers and hazards had been assumed by the libelant's intestate.

As a Third Separate and Complete Defense

Thirty-fourth: That the libel fails to state a claim upon which relief can be granted.

[fol. 42] Wherefore, Respondent-impleaded, El Dorado Oil Works, demands that the libel be dismissed with costs

to the Respondent-impleaded as against the libelant and that the Court will grant to the Respondent-impleaded such other, further and different relief as the justice of the cause may require.

Kirlin Campbell & Keating, Counsel to Wilbur Stevens, Esq.; Proctor for Respondent-Impleaded. Office and P. O. Address: 120 Broadway, New York 5, N. Y.

State of New York,
County of Hudson, *ss.*:

Wilbur Stevens, being duly sworn, says:

I am the proctor for the Respondent-Impleaded in this matter.

I have read the foregoing answer of the Respondent-Impleaded to the libel and the same is true to the best of my knowledge, information and belief.

The reason this verification is made by me and not by the Respondent-Impleaded is that it is a corporation, none of whose officers is present in this State.

/s/ Wilbur Stevens

[Jurat]

[fol. 42b]

IN UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ 12-55

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, Libelant,

v.

The vessel m/v TUNGUS, her boilers, etc., and DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMPSKIBS-AKTIESELSKAB, et al., Respondents,

and

EL DORADO OIL WORKS, Respondent-impleaded.

ANSWERS OF LIBELANT TO THE INTERROGATORIES PROPOUNDED TO HER BY THE RESPONDENTS—Filed April 14, 1955

1. September 11, 1915
2. September 25, 1909
3. May 9, 1936
4. June 11, 1939
5. July 21, 1942
6. May 12, 1951
7. El Dorado Oil Works
8. About 1949
9. Yes.
10. Maintenance Foreman.
11. Maintenance Foreman.
12. Westinghouse Elevator, William H. Flinn, Nash Inc. and other companies.

13. 1950 — $4,912.88
1951 — 5,169.99
1952 — 6,267.95

[fol. 42c]

14. 1950 — $4,912.88
1951 — 5,169.99
1952 — 5,452.99

15. 8 hours and overtime.

16. Dec 6 was called back 12:00 midnight.

17. On information and belief Carl E. Skovgaard met his death before reaching the scene of discharging operation on board the m/v Tungus.

18. Shortly after 1:00 a.m. Dec 6, 1952.

19. In the course of the performance of his duties as maintenance foreman for El Dorado Oil Works.

20. Superintendent of plant.

21. No.

22. No.

23. See No. 22

24. No.

25. Usual duties as maintenance foreman for El Dorado Works.

26. From shortly after 1:00 a.m. Dec. 6th to time of his death.

27. He had been off duty.

28. On information and belief the m/v Tungus was unseaworthy in that its decks were unsafe and dangerous by reason of being oily and slippery, and by reason of beams and hatch covers which were improperly placed and stacked and permitted to so remain on the deck so as to obstruct passage, and in that it was not properly and sufficiently lighted. and in that it lacked nets, ropes, railings, guards or

safety equipment, and in that its apparatus, appliances and pump, were defective, broken, out of order and inadequate.

29. In failing to furnish decedent with a safe place to perform his work; in failing to furnish proper and safe appliances and pumps for the performance of the work; in causing or permitting the apparatus, appliances and appurtenances and pumps to be defective, unsafe, dangerous and inadequate; in causing or permitting beams and hatch covers to be improperly placed on the deck of said vessel so as to obstruct passage; in failing to make proper and sufficient inspection of said vessel, its decks and passageways and of the apparatus, appliances, appurtenances and pumps; in failing to properly and sufficiently supervise the removal, placement and storage of beams and hatch covers on said vessel [fol. 42d] and the performance of the work; in failing to issue prompt, proper and sufficient orders and instructions; in failing to issue prompt, proper and sufficient warnings and cautions concerning the dangerous and unsafe apparatus, appliances, appurtenances and pumps and condition of decks and passageways of said vessel; in failing to furnish and maintain the decks and passageways of said vessel in clean and clear condition; in that the decks and passageways were oily and slippery; in failing to furnish proper and sufficient illumination and lighting; in failing to furnish nets, ropes, railings, guards or other equipment for the safety of workmen; in failing to supply a vessel, apparatus, appliances, appurtenances and pumps free of defect and in seaworthy condition; in that those in charge of the vessel were incompetent, unexperiences (sic) and inattentive to their duties.

30. In causing deceased to fall into the hold of the vessel resulting in his death.

31. See No. 28.

32. Deceased sustained lacerations of head, suffocation and shock following submersion in oil resulting in his death.

33. Exact period of time unknown to libelant.

34. None by libelant.

35. Exact period of time unknown to libelant.

36. See No. 32.

37. See No. 33

38. See No. 34

39. See No. 35

40. Libelant believes decedent was not the member of a union.

41. See No. 40.

42. See No. 40.

43. Approximately $5,000. per year.

44. No.

45. See No. 44.

46. No.

47. See No. 46.

[fol. 42e]

48. Mate of the vessel m/v Tungus

49. On information and belief Carl E. Skovgaard met his death before reaching the scene of discharging operation on board the m/v Tungus.

50. Salvatore Russo, 588 Boulevard, Bayonne, N. J.
Edward Donohue, 11 Meadow St., Bayonne, N. J.
Patrick Sexton, 45 Broadway, Bayonne, N. J.

51. See No. 50.
Dr. Rose Wonge, ambulance attendant, Patrolmen Murphy, Lissenden, Thomas Heaney and other members of the Bayonne Police Dept. whose names and

addresses are unknown to libelant. Officers and members of the crew of the m/v Tungus whose names and addresses are unknown to libelant.

52. Improper.

53. N. W. Blaney, c/o El Dorado Oil Works.

54. The persons upon whom libelant proctors will rely at the trial of this action is within their discretion and not within libelant's knowledge.

55. See No. 50.

56. None written.

57. See No. 56.

/s/ Nathan Baker, Proctor for libelant, Office & P. O. Address, 1 Newark St., Hoboken, N. J. and 220 Broadway, room 2104, New York City.

[fol. 42f] *Duly sworn to by Olga Skovgaard, jurat omitted in printing.*

[fol. 42g] Affidavit of service (omitted in printing).

[fol. 42h] [File endorsement omitted]

[fol. 43]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

ANSWERS TO INTERROGATORIES PROPOUNDED BY LIBELANT—Filed April 29, 1955

1(a) Tungus was not under charter on December 6, 1952.

1(b) The agent in New York for the m/v Tungus on December 6, 1952, was Barber Steamship Lines, Inc.

1(c) The Master on the m/v Tungus on December 6, 1952, was Ulav Nilsen. Captain Nilsen is employed by the respondents other than Barber Steamship Lines, Inc., and is again master of the m/v Tungus.

1(d) The Chief Mate of the m/v Tungus on December 6, 1952, was Finn Folkman, who resides at Trondheim, Norway. Finn Folkman's present employment is unknown. The Second Officer of the m/v Tungus on December 6, 1952, was Lauritz Rosvik, whose home address is presently unknown, and who is presently employed by the respondents other than Barber Steamship Lines, Inc., aboard the m/v Tudor. The Third Officer aboard the m/v Tungus on December 6, 1952, was Sven Augensen, whose home address is Slevik, Onsay, Norway. He is presently employed by the respondents other than Barber Steamship Lines, Inc., as Second Officer aboard the m/v Tungus.

1(e) The m/v Tungus was under the command of Captain Ulav Nilsen on December 6, 1952.

2. See answer to Interrogatory No. 1(c) and (d).

3. A written report concerning the work being performed aboard the m/v Tungus on December 6, 1952, and concerning the accident to the libelant's decedent aboard the m/v Tungus on December 6, 1952, was made in the deck log of the m/v Tungus, which report was made by the officers of the m/v Tungus. The deck log of the m/v Tungus is either aboard the m/v Tungus or in Norway.

[fol. 44] 4. See answer to Interrogatory No. 3.

5. Finn Folkman, Sven Augensen, Salvatore Russo, Patrick J. Sexton and Edward Donohue.

6. Improper.

7. See answer to Interrogatory No. 3.

8(a) On December 6, 1952.

8(b) By one of the mates of the m/v Tungus.

9. Yes.

10. The mates of the m/v Tungus.

12. Yes.

13(a) Unknown at present.

13(b) Officers of the m/v Tungus.

13(c) No.

14. Yes.

15(c) Unknown at present.

15(b) Officers of the m/v Tungus.

15(c) No.

16. The employees of El Dorado Oil Works were aboard the m/v Tungus on December 5 and 6, 1952 discharging coconut oil from the port deep tank, #3 hatch to the El Dorado Oil Works storage tanks ashore at the El Dorado Oil Works plant.

17. No photographs were taken prior to the institution of suit.

17(c) See answer to 17.

17(d) See answer to 17.

18. Salvatore Russo, Patrick J. Sexton and Edward Donohue.

[fol. 45] 20. 1725 on December 5, 1952.

21. Employees of El Dorado Oil Works, whose names are presently unknown. A member of the crew, name unknown, operated the winch under the direction of the employees of El Dorado Oil Works.

22. A supervisory employee of El Dorado Oil Works, whose name is presently unknown.

23. Employees and supervisory personnel employed by El Dorado Oil Works, whose names are presently unknown.

24. Yes.

Dated: New York, N. Y. April , 1955.

Haight, Gardner, Poor & Havens, Proctors for Respondent, 80 Broad Street, New York 4, N. Y.

State of New York,
County of New York, *ss.*:

J. Ward O'Neill, being duly sworn, deposes and says:

I am a member of the firm of Haight, Gardner, Poor & Havens, Counsel to Messrs. McAleer, Connell & Corridon, Proctors of Record for Respondents Den Norske Afrika-OG Australielinie, Wilhelmsens Dampskibsaktieselskab, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, and A/S Tankfart VI; I have read the foregoing Answers to Interrogatories and know the contents thereof, and the same are true to the best of my knowledge, information and belief.

The reason this verification is made by the deponent and not by the said respondents is that Den Norske Africa-OG Australielinie, Wilhelmsens Dampskibsaktieselskab, [fol. 46] A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, and A/S Tankfart VI are foreign corporations not having an officer thereof within jurisdiction of this Honorable Court.

/s/ J. Ward O'Neill

[Jurat]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civ. 12-55

INTERROGATORIES PROPOUNDED BY THE RESPONDENTS ADDRESSED TO THE RESPONDENT-IMPLEADED AND ITS PROCTORS TO BE ANSWERED IN WRITING AND UNDER OATH—Filed August 24, 1955

1. With reference to the shipment of approximately 480 long tons of Philippine Crude Cocoanut Oil in bulk discharged from m/v Tungus at Pier 3, Bayonne, New Jersey on December 5, 1952 and December 6, 1952 state the following:

(a) Who was the owner of the shipment on the dates of discharge?

(b) For what purpose was this shipment discharged into the possession of El Dorado Oil Works at its plant in Bayonne, New Jersey?

(c) At whose request did El Dorado Oil Works discharge the shipment?

(d) For whose account was El Dorado Oil Works discharging the shipment?

(e) What was the relationship of Pacific Vegetable Oil Corporation to that shipment?

(f) What was the relationship of Davies Turner & Co., 8-10 Bridge Street, New York City, to the shipment or to El Dorado Oil Works?

2. When was El Dorado Oil Works first requested or [fol. 47] ordered to discharge a shipment of approximately 480 long tons of Philippine Cocoanut Oil in bulk from the m/v Tungus upon the arrival of that vessel in the Port of New York in December, 1952? From whom was the order or request received?

3. With respect to the deceased, Carl E. Skovgaard state the following:

(a) What was his position with El Dorado Oil Works on December 5 and December 6, 1952?

(b) How long had the deceased been employed in the position described in sub-paragraph 3a?

(c) What were the wages of the deceased in the position described in sub-paragraph 3a?

4. At what time on December 5, 1952, did employees of El Dorado Oil Works first report aboard m/v Tungus?

5. Did any employees of El Dorado Oil Works attend aboard m/v Tungus during the surveying of the shipment of cocoanut oil in bulk?

6. If so, what were the names of those employees and what were their capacities or positions on that date.

7. Did any employees of El Dorado Oil Works attend aboard m/v Tungus prior to the time that the El Dorado Oil Works pump and hoses were taken on board the vessel?

8. If so, what were the names and positions of these employees?

9. Describe in full with respect to make, mark, model and size the pump and hoses taken aboard the m/v Tungus in order to discharge the shipment of bulk cocoanut oil.

10. How many men formed the pump crew which went [fol. 48] aboard m/v Tungus with the pump and hoses?

11. What were the names of the members of the pump crew at the time the pump and hoses were taken on board the vessel?

12. What was the name of the El Dorado Works employee on the scene in charge of the pump crew and/or the pumping operation at the time the pump and hoses were taken on board the vessel?

13. Were any employees of El Dorado Oil Works in the #3 upper 'tween deck of m/v Tungus at the time the port deep tank tank lid was first lifted, and if so, what were the names and positions of those employees present?

14. Who directed the placing of the port deep tank tank lid on the tank coamings in #3 upper 'tween deck of m/v Tungus in preparation for discharging of cocoanut oil?

15. Who directed the placing of the pump and the rigging of the hoses in the #3 upper 'tween deck of m/v Tungus on December 5, 1952?

16. Describe the artificial light present in the #3 upper 'tween deck at the time the discharge of the cocoanut oil began on the evening of December 5, 1952.

17. Were any additional lighting facilities or fixtures requested by any of the employees of El Dorado Oil Works on December 5 or December 6, 1952?

18. Did the original pump crew which came aboard with the hoses on the evening of December 5, 1952, remain aboard the m/v Tungus or remain on duty with the pumping equipment throughout the evening of December 5, and the morning of December 6, 1952?

19. If not, at what time did the pump crews change and what were the name of the personnel in the El Dorado Oil

[fol. 49] Works pump crew working on the discharge of cocoanut oil from the port deep tank from midnight on December 6, 1952, through 0330 on the morning of December 6, 1952?

20. Who was in charge of the pump crew on behalf of El Dorado Oil Works for the period of time described in Interrogatory No. 19?

21. What were the respective duties of the various members of the El Dorado Oil Works pump crew working on the discharging of bulk cocoanut oil from the port deep tank in #3 upper 'tween deck of the m/v Tungus on December 6, 1952, during the hours described in Interrogatory No. 19?

22. Was one member of the pumping crew required to remain on duty in the #3 upper 'tween deck of m/v Tungus in order to maintain a constant watch on the pump itself on the morning of December 6, 1952, prior to the rupture of the discharge hose?

23. What was the name of the employee of El Dorado Oil Works in immediate charge of the electric pump of El Dorado Oil Works aboard m/v Tungus in #3 upper 'tween deck on the morning of December 6, 1952, during the hours described in Interrogatory No. 19?

24. Who, on behalf of El Dorado Oil Works, was first informed shortly after midnight on the morning of December 6, 1952, that there was a leak in the discharge hose leading from the pump to the shore facilities of El Dorado Oil Works, and by whom was this employee so informed?

25. Upon receiving the information referred to in Interrogatory No. 24 what employees of El Dorado Oil Works [fol. 50] went back aboard m/v Tungus in order to correct the defect and/or stop the pump?

26. What caused the leak in the discharge hose of the pump in #3 upper 'tween deck of the m/v Tungus in the early morning hours of December 6, 1952?

27. To whom did the discharging pump belong?

28. To whom did the pump's suction line belong?

29. To whom did the pump's discharge line belong and where did it lead?

30. What was the source of the electricity being used to operate the discharging pump?

31. Was any steam used in conjunction with the discharge of the cocoanut oil by El Dorado Oil Works?

32. What was the source of this steam?

33. Who owned the steam line leading to the discharge hose and/or the electric pump aboard the m/v Tungus?

34. At what time and by whom was the deceased, Carl E. Skovgaard summoned from his home in order to report aboard m/v Tungus late on December 5, or early on December 6, 1952?

35. What were the usual working hours of the deceased, Carl E. Skovgaard on December 5, 1952.

36. To what employee of El Dorado Oil Works did the deceased, Carl E. Skovgaard report after being summoned from his home late in the evening of December 5, 1952 or in the early morning of December 6, 1952?

37. At what time did the deceased, Carl E. Skovgaard report aboard m/v Tungus? What was the purpose of his attending aboard the vessel and under whom was he supposed to be working?

[fol. 51] 38. Did the regular duties of the deceased, Carl E. Skovgaard, include the maintenance, repair and upkeep of this particular pump or similar pumps owned by El Dorado Oil Works?

39. How frequently did the deceased, Carl E. Skovgaard, attend aboard the various vessels mooring at Pier 3, Bayonne, New Jersey, or at other mooring facilities adjacent to or on the property of El Dorado Oil Works in Bayonne, New Jersey.

40. What were the normal duties of the deceased, Carl E. Skovgaard, in December, 1952, and did his normal duties include attending aboard whatever vessels might be

loading or discharging bulk oil or other substances at the facilities of El Dorado Oil Works, in Bayonne, New Jersey?

41. What portions of the #3 upper 'tween deck of the m/v Tungus were affected by the liquid cocoanut oil spillage resulting from the rupture of the discharge hose in the early hours of December 6, 1952?

42. After the rupture of the discharge line on the early morning hours of December 6, 1952, was there any spilled liquid cocoanut oil:

(a) On the port deep tank lid?

(b) The starboard deep tank lid?

(c) In and on the area 'tween the port and starboard deep tank coamings on the midship line?

(d) In the starboard wing of #3 upper 'tween deck?

(e) In the port wing of #3 upper 'tween deck?

(f) In the passageway between the forward end of the port and starboard deep tank coamings and the engine casing bulkhead?

[fol. 52] (g) In the area forward of the port and starboard deep tanks in #3 upper 'tween deck?

43. What efforts were made by employees of El Dorado Oil Works in order to salvage or clean up this oil spill prior to the arrival of the deceased aboard the vessel in the early morning hours of December 6, 1952?

44. If any cleaning up or salvaging operations were conducted by employees of El Dorado Oil Works after the rupture of the discharge line and prior to the arrival of the deceased aboard the vessel under whose direction were these operations conducted?

45. Was any request made on behalf of El Dorado Oil Works to any officer of m/v Tungus after the hose rupture and before the accident to the deceased for help or equipment with which to clean up the oil spill in No. 3 upper 'tween deck? If so, who made the request, to whom was it made and what help or equipment was requested?

46. What employees of El Dorado Oil Works were present in the upper 'tween deck when the deceased, Carl E. Skovgaard, first arrived in #3 upper 'tween deck?

47. What employees of El Dorado Oil Works were present in #3 upper 'tween deck when the deceased, Carl E. Skovgaard, fell into the port deep tank?

Dated: New York, N. Y. August 16, 1955

Haight, Gardner, Poor & Havens, By /s/ J. Ward O'Neill, A member of the Firm, 80 Broad Street, New York, N. Y., Of counsel to proctors of record for respondents: McAleer, Connell & Corridon, 1 Exchange Place, Jersey City, N. J.

To:

Wilbur A. Stevens, Proctor for Respondent-Impleaded, 60 Park Place, Newark, 2, N. J.

Kirlin, Campbell & Keating, Counsel to Proctor for Respondent-Impleaded, 120 Broadway, New York 5, N. Y.

[fol. 53]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

ANSWERS TO INTERROGATORIES PROPOUNDED BY RESPONDENTS—Filed September 30, 1955

Civ. 12-55

Foremost Food & Chemical Co., successor to El Dorado Oil Works, respondent-impleaded, answering the interrogatories propounded to it by the respondent, on information and belief, states as follows:

1. (a) Pacific Vegetable Oil Company.

(b) Storage.

(c) Davies, Turner & Co., or Pacific Vegetable Oil Company.

(d) Pacific Vegetable Oil Company.

(e) Owner.

(f) Broker, on behalf of Pacific Vegetable Oil Company.

2. El Dorado was probably informed by Davies, Turner & Co., that the shipment of cocoanut oil was to arrive in New York.

3. (a) Chief Maintenance Foreman.

(b) Since May 11, 1949.

(c) $2.05 per hour.

4. About 5 P. M.

5. Yes.

6. Maintenance Mechanic O'Leary; Receiving and Shipping Foreman Sexton; and Helper Arthur Sampson.

7. Yes.

8. Receiving and Shipping Foreman, Patrick J. Sexton.

9. A Blackmere rotary suction pump with a 4" rubber hose.

10. Two.

11. Maintenance Mechanic O'Leary and Arthur Sampson.

[fol. 54] 12. Patrick J. Sexton.

13. Yes, Patrick J. Sexton, Receiving and Shipping Foreman.

14. A mate on the M/V TUNGUS and some of the crew members of that vessel.

15. The Maintenance Department of the El Dorado Oil Works, under Mr. O'Leary.

16. The respondent-impleaded does not know.

17. The respondent-impleaded does not know.

18. No.

19. Salvatore Russo relieved Arthur Sampson at the pump at 11 P. M.

20. Patrick J. Sexton.

21. Sexton was in charge of the pump crew. Russo and another man whose name the respondent-impleaded at the present time does not know, composed the pump crew.

22. Yes, but there was no rupture of a discharge hose to the knowledge of the respondent-impleaded.

23. Russo.

24. The respondent-impleaded does not know of any leak in the discharge hose.

25. Russo was informed of a leak in the pump and went aboard the M/V TUNGUS.

26. The respondent-impleaded does not know of any leak in the discharge hose.

27. El Dorado Oil Works.

28. El Dorado Oil Works.

29. El Dorado Oil Works.
[fol. 55] It led to an unloading line on the pier and thence to oil storage tanks.

30. A temporary line ran from the El Dorado Oil Works plant to the pump.

31. No.

32. There was no steam line to the discharge hose on the pump, nor was there a steam line to the pump.

33. See answer to #32.

34. About 12 mid-night by Donahue.

35. 8 A. M. to 4:30 P. M.

36. The respondent-impleaded is not sure. Probably Donahue or Sexton.

37. About 12:30 A. M. To instruct other employees in the repair of the pump. He was a superintendent or supervisor.

38. Yes.

39. Respondent-impleaded does not know exactly, but Skovgaard attended more or less on every ship discharging

cocoanut oil at the El Dorado pier in Bayonne, New Jersey.

40. He was the foreman of the Maintenance Department.

41. The respondent-impleaded does not know.

46. Edward Donahue and Salvatore Russo.

47. Edward Donahue and Salvatore Russo.

Dated: September 26, 1955.

Kirlin Campbell & Keating, Counsel to Wilbur A. Stevens, Proctor for Respondent-Impleaded, Office and P. O. Address: 120 Broadway, New York 5, N. Y.

[fol. 56] State of New York,
County of New York, *ss.*:

J. W. Howell, Jr., being duly sworn, says:

I am Vice-President of Foremost Food & Chemical Co., successor to El Dorado Oil Works, the Respondent-Impleaded herein. I believe the foregoing answers to interrogatories to be true. They are made on information and belief.

The sources of my information and the grounds for my belief as to the matters not within my own knowledge are statements made to me by representatives of the respondent-impleaded and correspondence and other documents in its possession.

The reason this verification is not made by respondent-impleaded is that it is a corporation.

/s/ J. W. Howell, Jr.

[Jurat]

The Court: Does anybody dispute that he was an invitee on the respondent's vessel?

Mr. O'Neill: Yes, your Honor. That will be a question of law, sir.

The Court: All right. The next admission.

Mr. Baker: Next is the admission of the marriage and the birth records of the three children, without formal proof.

The Court: Will you take the documents?

Mr. Baker: Also the record of death, without formal proof.

[fol. 57] Mr. O'Neill: We question this, because that contains statements, and there wasn't any autopsy performed here.

The Court: As to cause of death?

Mr. O'Neill: Yes. The death was—dead on arrival. And there was no autopsy performed.

The Court: Then you will not accept this.

Mr. O'Neill: No, we just say, "Dead on arrival," because there wasn't any autopsy performed.

Mr. Baker: Well, would they admit the death certificate without formal proof?

Mr. O'Neill: We will admit the man died as a result of the fall—the date he died and as a result of a fall into a tank on board the Tungus.

Mr. Baker: No, we would like to have the death certificate admitted.

The Court: What is in here that is prejudicial to anybody?

Mr. O'Neill: That statement—"shock."

The Court: Shock.

Mr. Baker: Well, could we do it this way, so as to preserve the defendant any of their objections, that the death certificate may be offered by the plaintiff without formal proof, subject to any legal objections they have to the contents?

The Court: If he covered that up, would you have any objection to it going in?

Mr. O'Neill: Why does he need that? We admit the man died.

The Court: All right. They admit he died.

[fol. 58] Mr. O'Neill: As a result of a fall on our ship.

The Court: Will that be enough for you?

Mr. Cunningham: The usual purpose of a death certificate is to prove that he died and the cause of death. You don't want to prove any innuendoes that may be in that death certificate.

Mr. Baker: We may want to.

The Court: All right. It is stipulated that you may put in the certificate of marriage and the certificates of birth of the minor children, without formal proof, but a reservation will be made as to the death certificate.

Mr. O'Neill: That's right.

Mr. Baker: On the log book, we would like to have that stipulated with reference to the date of this occurrence of December 6, 1952.

Mr. Watson: May I remind you that when that translation was given to you it was unvouched for and that the original log book is written in Norwegian. And I think that was very clear at the time it was given to you at the Captain's deposition.

Mr. Baker: That's right.

Mr. O'Neill: We do not consider ourselves bound by the English translation that you have in your hand.

Mr. Baker: Well, will you admit the log book as it is without any translations, containing the entries of the date December 6, 1952?

The Court: Who is going to explain what is in there?

Mr. Baker: There is no jury.

The Court: To me. Will you have a competent man to translate?

[fol. 59] Mr. Baker: If you give us an opportunity to have it in our hands two weeks before trial we will have a competent person to translate it and present it to the Court.

The Court: If there is any difference, you have your chance.

Mr. O'Neill: That's right.

Mr. Watson: There are shades of meaning, your Honor.

The Court: I know. As one who speaks Italian I understand that very well.

Mr. Watson: We shall supply Mr. Baker with a photostate (sic) of the original Norwegian log and he can have it translated.

The Court: And you better have it translated yourself.

Mr. Watson: We shall.

The Court: You may agree.

Mr. Cunningham: I have already had it translated. So I won't have to do that.

I was going to suggest that the procedure on the admission or non-admission of the log books should apply here as in every case. You know in Admiralty cases how log books are admitted. Why call for anything particular in this case concerning log books?

Mr. Baker: We are here for the purpose of saving time.

We have here, as to proof of wages, withholding statements of Carl Skovgaard for the year 1952, which was the date of his death. He died December 6th of '52. Can we have a stipulation of counsel that these withholding statements can be admitted in evidence without formal proof?

Mr. Watson: In former years his wages were lower, [fol. 60] according to your answers to interrogatories.

Mr. Baker: I am just going into this 1952.

The Court: What they usually do in these Admiralty cases, they strike an average over a number of years.

Mr. O'Neill: Maybe three years.

Mr. Baker: Will you admit the three years we have here? I have no objection. There is 1950, 1951, 1952.

Mr. Cunningham: All I can agree to is the amount he received when he worked for El Dorado. I have the copies of the withholding certificates which indicate the amount he received from El Dorado.

The Court: Why do we have to bring down a man from Internal Revenue to read the W-2's and say the same thing? If they are not phony W-2's, let them go in.

Mr. Baker: If by any investigation they find it is erroneous, they can object.

The Court: If they are, it would be an honest mistake made by the authorities.

Mr. O'Neill: We are not claiming they are erroneous, Judge.

Mr. Baker: So the withholding statement for the El Dorado Oil Works for '52 shows earnings of $5,452.99, for William H. Flinn of Jersey City as the employer it shows earnings of $50.00, and for Nash, Inc., it shows earnings of $764.96.

Mr. Watson: Where is Nash, Inc.?

Mr. Baker: 316 Barrow Street, Jersey City. Flinn is 775 West Side Avenue, Jersey City.

The Court: So he worked for three different people in [fol. 61] '52. And do you have the W-2's for '52?

Mr. Baker: I have them and I will be glad to have those admitted, too.

The Court: You said three years.

Mr. Baker: For '51 the earnings were $5,169.99. And the same offer is made as to the withholding statements as proof, without formal proof. And for 1950 it is $4,912.88.

Mr. Watson: Will you have the W-2's for that on the trial?

Mr. Baker: Yes.

Mr. Watson: For the years '50 and '51, according to the answers to the interrogatories, he worked for no one except El Dorado.

[Discussion off the record.]

The Court: El Dorado Oil Works represented that it has the W-2's because the decedent worked for them for the years in question.

Mr. Baker: Does anybody have any objections to having these photographs offered in evidence?

Mr. O'Neill: We can't do it now. They are marked for identification. They will come up with the deposition and you will offer them.

Mr. Baker: Will counsel stipulate that they may be offered in evidence by the libellant at the trial without formal proof?

Mr. Cunningham: No one can stop you. You have the deposition of the Captain and they were marked as exhibits for identification during his deposition. I think it is best to wait for the trial, so we can have formal objections, if we have any.

[fol. 62] [Discussion off the record.]

Mr. Baker: It is stipulated that it will not be necessary to bring in the photographer to prove the authenticity of the photographs.

I think that exhausts our requests at this time.

The Court: Then I will see you the last Friday in October.

[fol. 63] IN UNITED STATES DISTRICT COURT

Ad 180-48

DEPOSITION OF OLAV NILSEN

Deposition of Respondents by Captain Olav Nilsen, taken by Libelant and Respondent-Impleaded, pursuant to notice returnable February 4, 1954, and pursuant to notice dated April 30, 1955, having been adjourned by agreement of counsel to June 27, 1955 at 2:30 o'clock P. M. and held at the offices of Messrs. Haight, Deming, Gardner, Poor & Havens, 80 Broad Street, New York, New York.

APPEARANCES:

Messrs. Baker, Garber & Chazen, Proctors for Libelant, By Milton Garber, Esq., Advocate.

Messrs. Haight, Deming, Gardner, Poor & Havens, Proctors for Respondents, By David P. H. Watson, Advocate.

Messrs. Kirlin, Campbell & Keating, Proctors for Respondent-Impleaded, By Joseph M. Cunningham, Esq., Advocate.

It Is Hereby Stipulated and Agreed by and between the proctors for the respective parties hereto that signing, sealing, filing and certification of the within deposition are hereby waived;

It Is Further Stipulated and Agreed that all objections except as to the form of the questions are hereby reserved to the time of the trial;

It Is Further Stipulated and Agreed that a copy of the said deposition shall be furnished to the proctors for the Respondents without cost to them.

OLAV NILSEN, residing at Jac-Falckvei 2, Tonsberg, Norway, called as a witness having been first duly sworn by [fol. 64] Daniel D. Simon, Notary Public, testified as follows:

Examination by Mr. Garber:

Q. Captain, will you state your present employer for us, please?

A. The Wilhelm Wilhelemsen Group.

Q. Are you employed as a captain, sir?

A. Yes.

Q. To what ship are you presently assigned as Captain?

A. I am at present on no ship at all.

Q. What ship was it that you were last assigned to as Captain?

A. The Tungus.

Q. When did you leave the vessel?

A. June 22, 1955.

Q. How long had you been master of the Tungus?

A. I joined the Tungus in August, 1951 and left her August, 1954 and joined her again January, 1955.

Q. All during your service on the Tungus did you act as Captain?

A. Yes.

Q. How long have you held your Captain's certificate, sir?

A. Well, since 1947.

Q. Prior to that time did you hold certificates or licenses as chief mate or other mate?

A. Yes. Chief officer.

Q. How long had you held a certificate or license as chief officer?

A. Since 1934.

Q. According to your testimony then, you were master of the Tungus on December 6, 1952? Is that correct?

A. That is correct.

Q. Can you tell us where the vessel was on that date?

A. Well, at the El Dorado oil pier, Bayonne.

Q. Is there a number for the El Dorado dock or a designation of it?

A. It may be. I don't remember now.

[fol. 65] Q. Do you recall in Bayonne that the dock is located at any street?

A. No.

Q. When did the vessel arrive at the El Dorado dock?

A. I have got to find that out from the log book.

Mr. Garber: You may refer to the log book if it refreshes your recollection in answering any of these questions, Captain.

A. 5:25 P.M. on December 5.

Q. And for what purpose did the vessel dock at the El Dorado dock in Bayonne?

A. To discharge the port deep tank of coconut oil.

Q. Was it just one tank to be discharged?

A. Yes.

Q. Did you personally receive orders to proceed to that dock for the purpose of discharging the tank?

A. We get all our orders from our agents here, from the Barber Steamship Company Line regarding shipping.

Q. Do you remember receiving those orders?

A. I would not shift the ship without receiving them, but I cannot remember how I got them. Probably they told me in the office.

Q. Were any preparations made for the discharging of this tank before the ship arrived at the dock?

A. No, except heating the oil to the required temperature, nothing was done.

Q. You mentioned oil. Will you describe the oil that was in the tank?

A. That was coconut oil. And it is heated, you see, to make it easier to pump ashore.

Q. How is the oil heated?

A. By coils in the bottom of the tank. Steam coils.

Q. Now, referring to the port deep tank, will you tell us [fol. 66] where that tank was located on the vessel?

A. In the after part number 3 hatch.

Q. And prior to your arrival at the Bayonne dock was that tank full?

A. No.
Q. How much oil did it contain?
A. As far as I can remember—I will give you it exact—

[Witness looks at log book]

Mr. Watson: Off the record.

[Discussion off the record]

A. [Continuing] As far as I can remember it was 478 long tons.

Mr. Gunningham: Captain, could you tell me please, where the recorded amount of the cargo is in the log book?
The Witness: Yes. I can find that.
It says 479 in the log book.
Mr. Cunningham: What are you referring to?
The Witness: Long tons.
Mr. Cunningham: What page?
The Witness: Page 73, October 12.
Mr. Garber: Perhaps for the sake of simplicity we ought to have the log book marked at this time.
Mr. Cunningham: Yes.
Mr. Garber: I offer the log book as Plaintiff's Exhibit I for identification.
Mr. Watson: Can we identify it before we mark it?
Mr. Garber: Do you want the whole log book?
Mr. Watson: Off the record.

[Discussion off the record]

[fol. 67] Mr. Garber: I offer excerpts of the deck log book of the MV Tungus covering the dates October 10, 1952 through October 12, 1952, and November 30 through December 12, 1952.

[Excerpts of deck log book referred to were received and marked Libelant's Exhibit 1 for identification]

Mr. Garber: I also offer photostatic copies of certain pages of the engineer's log of the MV Tungus covering December 5 and 6, 1952.

[Photostatic copies of pages of engineer's log book referred to were received and marked Libelant's Exhibit 2 for identification]

Q. Are you familiar, captain, with the dimensions of the port deep tank in the after number 3 hatch of the vessel?

A. No.

Q. Can you tell us what they are approximately?

A. Well, it is very hard. I don't think I can.

Q. You can't give us any idea of the tank in its entirety?

A. Well, I think the tank is about thirty feet deep, but the size I can't say without conferring with my drawings.

Q. Can you give us any idea how wide the tank is?

Mr. Watson: Do you mean the tank or the tank opening? They are not the same.

Mr. Garber: The tank itself. The port deep tank in the after number 3 hatch.

The Witness: Thirty-one feet wide, because the ship is sixty-two and this is half the ship.

Q. Can you give us your best estimation of the length of that tank?

A. No. I have to have the drawings. It is very hard to estimate.

Q. Is it as long as it is wide?

A. It is a little longer than it is wide.

[fol. 68] Q. Can you tell us, Captain, approximately in feet how high the cargo of oil was in that tank at the time the ship docked?

A. It was about twenty feet from the top of the tank to the oil.

Mr. Cunningham: Twenty feet from the top of the tank to the what?

All I want to know is the last word.

The Witness: Wait a minute. It was about six feet from the top when they started pumping.

Mr. Cunningham: What are you referring to for that information? That is your log? What page are you referring to?

The Witness: 141.

Mr. Cunningham: What date is that, sir?

The Witness: That is the 6th.

Mr. Cunningham: December 6, 1952?

The Witness: Yes.

Mr. Cunningham: Off the record.

[Discussion off the record]

Mr. Garber: May I continue?

Mr. Cunningham: Yes, surely.

Q. After the vessel docked at Bayonne, New Jersey, were preparations made by you or your officers or crew for the discharge of this tank?

A. Yes. The ship's crew lifted the lid and placed it across the top of the tank.

Mr. Cunningham: Captain, am I correct in assuming that you are reading that from the log book at this time?

The Witness: Yes.

Mr. Cunningham: Will you tell us what page you are reading from and the date?

[fol. 69] The Witness: Page 139, December 5.

Q. Were you present when that was done, Captain?

A. No.

Q. Was an officer of the vessel present?

A. That I don't know.

Q. Ordinarily, is there an officer of the vessel present?

A. Yes.

Mr. Watson: I object to the question.

Q. And what officer would customarily—

Mr. Watson: I object to the question. The captain has said he doesn't know in this particular instance whether there was an officer present or not.

Mr. Garber: I will withdraw the unfinished portion of my question.

Q. Will you tell us, captain, what your duties were with respect to the discharging of the oil from the vessel?

Mr. Watson: Can you explain whether you mean the captain's personal duties or the duties of the ship?

Mr. Garber: The captain's duties, as he understands it.

Mr. Watson: Well, his personal duties?

Mr. Garber: Performed by him, or supervised or done under his direction.

Mr Watson: Well, they are two different things.

The Witness: Well, I would like to have this question explained a little better before I can answer.

Q. Captain, do you have certain personal duties first?

A. The chief officer is handling the cargo of the ship.

Q. Does the chief officer work under your supervision, sir?

[fol. 70] A. Yes.

Q. Did you give the chief officer instructions?

A. Well, in most cases I do not have to, because the chief officer on Norwegian ships knows all about cargo and handling of cargo.

Q. What are the chief officer's duties on board the vessel?

A. His duties is to look after the cargo, upkeep of the ship, and to look after the crew. All the work as to the ship comes under him.

Q. Is it part of the chief officer's duties to conduct inspections of the vessel?

A. Yes.

Q. And does he conduct them personally?

A. Yes.

Q. When does he conduct those inspections?

A. Well, there is no certain times set up for that.

Q. Is there any routine followed by the chief officer for inspections of the ship?

A. Never.

Q. How frequently does the chief officer make inspections of the vessel?

A. What kind of inspections do you mean?

Q. Inspections of the vessel physically.

A. The chief officer is on the ship all the time in port when the cargo is being handled. He will be up and down the hatches several times a day, and he will be around all day.

Q. Does he conduct or perform his duties of inspecting the vessel while he is up and down, and about, as you say?

A. Yes.

Q. Is there any particular part of the vessel that the chief officer inspects?

A. You will have to explain that better to me before I can answer it, because if I remember correctly I said inspecting all the ship.

Q. Do I understand you correctly to say that his duties [fol. 71] are to inspect all of the ship?

A. Yes.

Q. And he does that physically?

A. Yes.

Q. Is that by visual inspection?

A. Yes.

Q. Does he conduct those inspections while the discharging operations are going on?

A. Yes.

Q. Can you tell us, captain, what officer of the vessel was on watch on December 6, 1952, and particularly during the hours of midnight and thereafter?

A. That was the third officer.

Q. What was his name, sir?

A. Syver Augensen.

Q. Does the third officer while on watch have any particular station?

A. No.

Mr. Watson: I object to that. Under what circumstances?

The Witness: I mean—

Mr. Garber: While cargo is being discharged.

The Witness: He will be probably around the hatches where the work is being done in.

Q. What are his duties while on watch?

A. To see that everything is going all right and the right cargo is going ashore, and everything concerning the cargo.

Q. Is it the duty of the officer on watch to make physical inspections of the vessel?

A. I don't really understand what you mean by physical inspection of the ship.

Q. Is it his duty to make inspections of the vessel's decks?

A. Yes. He will be around the decks and in the holds where cargo is worked, while he is on watch to see that everything works out all right.

Q. And while he is around the decks is it part of his duty to make inspection of them?

A. Make inspections? I can't get you there. He is [fol. 72] around there looking all the time. We don't call them inspections in our language. We call it watches —a watch on deck.

Q. Is it a part of the duties of the officer on watch to be on the lookout for any defective conditions that might arise?

A. Certainly.

Q. And what are his duties in the event that such conditions do arise?

A. To notify the people that is doing the work.

Q. In addition to notifying the people doing the work, does he have any other duties?

Mr. Watson: Can you make that clear as to whose equipment you are talking about at the time?

Mr. Garber: With respect to any equipment that is on board the vessel—

The Witness: You have asked that once more. I didn't get it.

Mr. Garber: Would you read that question?

[Record read]

A. We were just talking about the equipment, weren't we? I don't get the question.

Q. You don't understand the question, captain?

A. No.

Q. I understand your testimony to be that in the event there is a defective condition that arises in equipment aboard the vessel, the officer on watch has the duty of notifying, you tell us, the people who are doing the work; does he have any other duties besides notifying the people, or do his duties cease there?

The Witness: Could you explain that to me [addressing Mr. Watson]?

[fol. 73] Mr. Watson: What Mr. Garber wants to know, captain, is if the officer on watch finds some defect in equipment on the ship has he any other duties besides notifying the people who are working with that equipment. Is there anything else that he should do when he finds defective equipment like that?

The Witness: In this particular case, no, because these people were not employed by us.

Q. You are referring to the particular operation that was going on, the discharging of oil on December 6, 1952? Is that right?

A. Yes.

Q. In your answer to that question?

A. Yes.

Q. Do the duties of the officer on watch with respect to the equipment being used differ, depending upon whether the equipment belongs to the ship or doesn't belong to the ship?

A. In this case where the fault with the equipment caused damage to our other cargo, of course the officer on watch had to see that that was stopped.

Q. What are the duties of the officer on watch, captain, with respect to equipment of the vessel?

A. Well, if there is anything wrong he has to report to the chief officer immediately.

Q. Does the officer on watch take any steps?

A. Then he will take steps immediately to correct it.

Q. When you say "he" are you referring to the officer on watch or the chief officer?

A. Chief officer.

Q. Is that procedure different where the equipment on board the vessel is not owned by the ship?

A. Do you mean you are talking about this case now?

Q. I am talking about any situation.

A. I can't answer that.

[fol. 74] Q. His duties may be different do you mean?

A. I didn't answer that question.

Q. You didn't answer the question?

A. No. I can't answer it because it is impossible.

Q. Are you familiar with the duties of the officer on watch?

A. Yes.

Q. Are you familiar with his duties with respect to equipment that is on board the vessel?

A. Yes.

Q. Well, can you answer my question as to what his duties are then with respect to any equipment that is on board the vessel that is not owned by the ship? A. I can explain it this way:

If we see something wrong with the equipment, of course we tell it to the people that is responsible for it and have them correct it. That is another thing. They are

around there themselves seeing it just as we, and they correct it without us telling them.

Mr. Watson: I move to strike out the last two sentences as not responsive.

Q. Were any instructions given to the officers on watch on the MV Tungus concerning their duties with respect to any equipment used on board the vessel not owned by the ship?

A. No.

Q. Would it be the duty of the officer on watch to stop discharging operations in the event that equipment being used became defective?

A. Do you mean he stop it personally or have somebody else stop it?

Q. To either stop it or see that it is stopped.

A. Well, if the officer on watch sees anything wrong with the equipment he will of course tell them to stop, but [fol. 75] in most cases if they see that something is wrong they will stop without orders.

Q. In the event they do not stop without orders, do I understand it is his duty to stop it?

A. He has to find the right people to stop it. You can't expect the officer on duty to handle this equipment from shore, which he doesn't know much about, like an electric pump or steam pump, or anything like that.

Mr. Watson: I move to strike out the entire last sentence as not responsive.

You really weren't asked that.

Q. What are the duties of the officer on watch with respect to any unsafe conditions that might arise on the vessel?

A. Correct them.

Q. Does he do that himself?

A. Yes.

Q. Can you tell us, captain, when the discharging operation commenced in Bayonne, New Jersey?

[Witness looks at log book.]

Mr. Garber: What page are you referring to before you give us your answer?

The Witness: That is page 139.

Q. [Continuing] What date, sir?

A. December 5. Pump started 8:05 P.M.

Q. I understand that is the pump from the port deep tank in after number 3?

A. Yes.

Q. Were you present in that vicinity, sir, between the time that the vessel docked and the time the pumping commenced?

A. No.

Q. To your knowledge, or does the log book show, as to whether the chief mate was present in that vicinity during [fol. 76] that peripd of time?

A. The log book doesn't show that.

Q. Does it show whether any officer of the vessel was present during that time?

A. No.

Q. Is it customary for an officer to be present?

A. It is customary, but it is very seldom put down in the log book.

Q. Is that the officer on watch?

A. Yes.

Q. Will you describe for us the hatch opening of the port deep tank?

Mr. Watson: Can you be a little more specific? As to what do you mean?

Mr. Garber: As to its dimensions.

Mr. Watson: Well, the captain has already said he couldn't give you the dimensions.

The Witness: No. I have to go back and get the drawings to get the size of it.

Q. Can you tell us approximately what the dimensions are?

A. I do not like to guess. If I give it to you I want to give it to you right. The only thing I know they are two feet and eight inches high.

Q. I show you a photograph, captain, will you tell us what that photograph shows, if you can?

A. The top of the port and starboard deep tank covers in number 3.

Mr. Garber: I offer the photograph for identification as Libelant's Exhibit 3 for identification.

[Photograph referred to was received and marked Libelant's Exhibit 3 for identification.]

Q. I show you another photograph, captain. Will you tell us what that shows, if you can?

A. Well, that is the port and starboard deep tanks in [fol. 77] number 3. The same as the other one.

Mr. Garber: I offer that for identification.

[Photograph referred to was received and marked Libelant's Exhibit 4 for identification.]

Mr. Watson: Off the record.

[Discussion off the record]

Q. I show you another photograph. Will you identify that for us, if you can?

A. Well, that is also the starboard and port tanks in number 3 deep hatch.

Mr. Garber: I offer that photograph for identification.

[Photograph referred to was received and marked Libelant's Exhibit 5 for identification.]

Q. I show you another photograph, captain, will you please identify that if you can?

A. That is also the starboard and port deep tanks in number 3 hatch.

[Photograph referred to was received and marked Libelant's Exhibit 6 for identification.]

Mr. Cunningham: I believe the record should show that the four photographs which have been marked for identification as Libelant's Exhibits were produced here today by Mr. Watson, counsel for the Respondents.

Mr. Watson: Pursuant to order of the Court.

Q. I show you Libelant's Exhibit 5 for identification, and I refer you to the position of the tank cover in that photograph.

Will you tell us whether that is the customary position for the tank cover when the tank is open?

A. No.

Q. What is the customary position of the tank cover when opened?

A. It is taken all the way out on the side of the ship [fol. 78] so the whole tank is open.

Q. And where is the tank cover placed?

A. On the deck beside the tank top.

Q. When you say on the deck, can you tell us that more specifically? Is it placed adjacent to the tank coaming?

A. No. It is all the way out in the wing of the ship lying flat on deck.

Q. Is there any particular wing that the tank cover is placed in?

A. That will be on the port side for a port tank, and starboard side for the starboard tank.

Q. Is that the proper location for the tank cover when the tank is opened?

A. Yes, when the tanks are opened and used for dry cargo. Yes.

Q. What is the proper position of the tank cover when the tanks are used for wet cargo such as oil?

A. They are probably put on like that position there.

Mr. Garber: Referring to Libelant's Exhibit 5.

Mr. Watson: You are pointing to the starboard deep tank cover.

The Witness: Like the starboard deep tank cover when there is oil in the tank.

Q. Is that the proper position when the tanks are open or closed?

A. Closed. That is the position when it is closed [indicating].

Mr. Watson: Indicating the starboard tank top in Libelant's Exhibit 5.

The Witness: Yes.

Q. When the tanks are used for the carriage of wet cargo such as oil, captain, and all my questions will be dealing with that, what is the proper position for the tank cover [fol. 79] when the tanks are open—

A. Well—

Mr. Watson: Do you understand the question? You started to answer before he had finished his question.

A. [Continuing] They are never opened when we carry oil in them. The lids are always on.

Q. Will you describe for us, captain, the procedure for discharging oil from the tanks.

A. When they start discharging the oil the lids are lifted off and placed athwartships above the top of the tanks, and the pumps are then placed on top of the lids again.

Q. Are the lids placed in the position approximately as shown in the picture, Libelant's Exhibit 5, on the tank, and to the right, looking at that picture?

A. Yes.

Q. That is the proper position for them while the oil is being discharged?

A. Yes.

Q. Who performs the operation of placing the lid in that open position?

A. The crew does that.

Q. And when do they perform that?

A. After a surveyor has measured the ullage and taken the temperature, and taken samples of the oil.

Q. And was that done, sir, on December 5, 1952 on board the MV Tungus?

A. Yes.

Q. Can you tell us the time when the surveyor made those measurements?

Mr. Watson: May we have the log book, Mr. Cunningham?

Mr. Cunningham: Oh, yes, excuse me.

[Log book handed to witness]

A. According to my log book the surveyor arrived on [fol. 80] board at 5:30 P. M. and took the necessary measurements in the presence of the chief officer.

That is page 138 of the deck log book.

Q. Were any of the other ships' crew present at that time?

A. I don't know.

Q. Were any persons connected with the El Dorado Oil Works present at that time?

A. I don't know.

Q. You told us that then a pump was brought aboard, is that correct?

A. No. I have never said that. I just said about placing the lids. That is as far as I went.

Q. Is the pump brought aboard after the lid is placed in the open position?

A. According to the log book.

Mr. Watson: Are you talking about this particular instance or are you talking about customarily, because up to now you have been talking about customarily.

Mr. Garber: I am talking about this particular instance.

A. According to my log book the pumps were taken on board by the crew after the pump crew's direction and placed according to pump crew's directions.

Q. Will you tell us what time that was done?

A. They started 6:30 P. M., but the exact time when the pump was taken, I can't tell.

Q. Can you describe the pump for us?

A. No.

Q. That was brought aboard?

A. No.

Q. Was it more than one pump that was brought aboard?

A. Only one pump, according to the log.

Q. Was that pump placed in position in hatch number 3?

[fol. 81] A. According to my log book it just says that it was placed after pump crew's directions.

Q. Do you have any knowledge as to where that pump was placed on board the vessel?

A. It was placed on top of the tank lid.

Q. By whom was the pump crew employed?

A. By the receiver of the oil.

Q. And who was that in this instance?

A. Well, I can't tell that because the only thing I know the oil contract says that the oil is loaded and discharged by shipper and consignee.

Mr. Watson: Captain, you can talk much louder than that. I can't hear you because you drop your voice.

The Witness: I am sorry. I will try to do better.

Mr. Watson: No. You don't have to do better but just talk about half the normal speech you use on the ship.

Q. Are you familiar with the contract, captain?

A. A copy of that contract is always delivered to me upon the loading of the cargo in the Philippine Islands.

Q. Did you familiarize yourself with the contract that was delivered to you?

A. Well, I always—

Q. Covering this cargo in the port deep tank after number 3 hatch?

A. I always look it up because I know it is going to be of interest to us.

Q. Can you tell us at the present time who the consignee of that cargo was, the receiver?

A. No.

Q. In the makeup, captain, of the tank opening are there any beams?

A. When oil is carried no beams are on the tanks.

Q. In the physical construction of the tank are there beams?

[fol. 82] A. For dry cargo, yes, but not for oil.

Q. And when oil is carried where are the beams placed?

A. They are usually placed between the hatch coamings like shown in this picture, Libelant's Exhibit number 5.

Q. When you say between the hatch coamings do you refer to the space between the port and starboard tanks?

A. Yes, sir.

Q. How big are those beams?

A. Well, they are just the length of the deep tank opening, and I should say they are about twelve inches high.

Q. And how wide are they?

A. My guess is four inches.

Q. How many of those beams for each tank?

A. One for each.

Q. Can you tell us approximately how big the space is between the port and starboard tanks?

A. Well, this is only approximately—that is my guess—I would say two and a half feet.

Q. What lighting facility fixtures are there in the number 3 hatch of the MV Tungus for providing light?

A. There is no fixtures in the hold or on the ship.

Q. And how is light customarily provided in that area?

A. With clusters, which is rigged out every night and taken in every morning.

Q. By whom are they rigged out?

A. By the ship's crew.

Q. Are those clusters part of the ship's equipment?

A. Yes.

Q. Were there clusters in the number 3 hatch on December 5 and 6th?

A. According to my log book on page 139 there are four [fol. 83] clusters each 500 watts rigged out in number 3 hatch.

Q. Where were those clusters situated?

A. I don't know.

Q. Captain, were you aboard the vessel on December 5, 1952?

A. Yes.

Q. And did you remain on board during the time that the discharge operation of oil was going on?

A. Yes.

Q. Did you learn of an accident that occurred?

A. As far as I can now remember I was informed the next morning.

Q. About what time were you informed, to your best recollection?

A. I can't recollect that now.

Q. By whom were you informed?

A. By the chief officer.

Q. Did he make a written or an oral report to you?

A. An oral report.

Q. Can you recall what he told you?

A. No.

Mr. Watson: I object.

A. [continuing] No, not now.

Q. Were you informed of the accident that occurred by anyone else?

A. No.

Q. Did you make an inspection?

A. Yes.

Q. And when was that?

A. Wait a minute. The discharging of the oil was then finished.

Q. When was that inspection made by you?

A. Between 8 and 8:30 in the morning.

Q. Where did you go?

A. Down in number 3 hold.

Q. And will you tell us what inspection you made there?

A. Well, I just looked down the tank. That is all I could [fol. 84] do. The tank was then empty.

Q. Was the tank open?

A. It was still open, yes.

Q. And what was the position of the cover, if you recall?

A. As in this Libelant's Exhibit number 5.

Q. Are you referring to the tank on the right hand side in that photograph?

A. Yes, the port tank.

Q. What was the position of the cover of the starboard tank?

A. At the time I was down there that was just being removed from shifting from one tank to the other.

Q. Do you know what the position of that cover was during the preceding night?

A. No.

Q. Was that tank cover supposed to be closed during the preceding night?

A. Yes.

Q. I understand then that you just looked down into the port tank?

A. Yes.

Q. Did you make any other physical inspection of the vessel in that area?

A. No.

Q. Did you inspect the decks of the vessel in that area?

A. No.

Q. At that time were you accompanied by your chief mate?

A. No.

Q. Were you accompanied by any officer?

A. No.

Q. Was anyone else present?

A. No.

Q. Did you speak to any of the other officers or members of your ship's crew about the occurrence on the MV Tungus?

A. That I can't remember.

Mr. Watson: Will you limit that as to when he talked to any of them. This is three years ago now. Do you mean [fol. 85] on that day or on subsequent dates? Do you mean that morning or when?

Mr. Garber: Let us say that morning first.

The Witness: That I can't remember now.

Q. Did you receive any written report concerning the occurrence?

A. No.

Q. Did you on any subsequent date discuss the occurrence with your chief officer or any other member of the crew?

A. No.

Q. Did you at any subsequent time receive a written report concerning the occurrence?

A. No.

Q. Did you make any written report concerning the occurrence?

A. It was in the log book.

Q. Aside from the log book record, did you make any other written report?

A. No. All the extracts from the logs were sent to our company in Norway and the Barber Line.

Q. Was any accident report made by you or any other of your officers or crew?

A. All the extracts of logs have been sent.

Q. The entry then was made in the log book concerning that occurrence?

A. Yes.

Q. Will you read that entry to us, please?

A. That is in Norwegian.

Mr. Watson: May I say at this time that I do not think the captain is a qualified translator of Norwegian. I would be afraid that some of the meanings he might translate might be the original meaning as written in Norwegian, but not correct in English, and certainly not just read out [fol. 86] like that, because a translation is something that has to be done very carefully. I believe you can ask the captain what the gist of the report is, but don't ask him for an exact translation.

Q. Did you refer to the log book after you learned of the occurrence in order to find out what happened?

A. Yes.

Q. And will you tell us where that entry appears in the log book concerning this occurrence?

A. Page 139, 140, 141.

Q. Will you tell us what you learned from referring to the log book as to what had occurred?

A. That at 0125, that is A. M., on December 6, the foreman for a pump crew, Carl Skovager, fell down in a tank and was killed.

Q. Is that the only entry in the log book concerning this occurrence?

A. No.

Q. What else did you learn?

A. It says that the oil left in the deep tank was about 8 feet from the bottom and 22 feet from the top. That his helpers immediately ran down the ladder of the deep tank to get hold of him.

The ship's watch crew, the first, second and third officer went immediately after to get a boat hook and ropes. An ambulance and doctor were sent for, and a stretcher, and a derrick was made ready to get the injured man ashore.

At 1:35 he had been found and taken up from the tank, and was brought ashore at the same time as the ambulance and doctor arrived. The doctor could just announce him dead.

Mr. Garber: Is that the completion of your answer to my question?

The Witness: Will you please repeat the question?

Mr. Watson: Do you want him to read this whole thing [fol. 87] for you, or do you want him to paraphrase it, because right now the captain has been trying to translate it.

Mr. Cunningham: That is what I think he has been doing.

Mr. Watson: Yes, I know he has. If you want the whole entry translated by the captain, that is one thing.

Mr. Garber: I want to find out what the captain learned.

Mr. Watson: In other words, you just want to know what the log now says?

Mr. Garber: That is right.

Mr. Watson: The captain has no first hand or personal knowledge as to what he is reading. He is just reading from the log book. And I think since the captain has learned no more than is in the log entry the log entry should speak for itself.

Mr. Garber: On a discovery and inspection, if he discovered subsequent to the accident some information, we are entitled to find out what it is.

Mr. Watson: I don't follow that. You have your discovery and inspection, and you have the log. The captain said he had no first hand knowledge, and that he knew nothing about the accident until the following morning, and the only way he knew anything about it is what was in the log. That was your question. And I suggest the log book entries speak for themselves.

Mr. Garber: Will you permit him to tell us what he learned from the log book entries?

Mr. Watson: If you want to go ahead in that fashion.

The Witness: I am pretty bad at translating. I suggest [fol. 88] you get the whole thing translated by an official translator.

Q. Have you read the entire entry concerning this occurrence?

A. Just of the accident itself.

Q. Perhaps you do not understand my question. Had you on the morning following this occurrence or thereafter referred to the log book in order to find out what happened?

A. Yes.

Q. In number 3 hatch?

A. Yes.

Q. And did you from reading the log book find out what happened?

A. Yes.

Q. Will you tell us what you found out from reading the log book?

A. I just read it.

Q. Is that all that you found out as to what happened the previous night from reading the log book?

A. Yes.

Q. Did you find out from reading the log book that any equipment had broken or become in disrepair?

A. Well, the equipment was broken, but that was before the accident happened.

Q. You found that out from reading the log book, captain?

A. Yes.

Q. Can you tell us what you found out from reading the log book?

Mr. Watson: May I suggest at this time that you ask the captain whether he has any independent knowledge of this accident other than what is contained in the log book, because from the wording of your question he has no alternative but to translate the log book.

Mr. Garber: I think that question would be your cross examination.

Mr. Watson: Off the record.

[fol. 89] [Discussion]

Mr. Garber: Why don't we have the captain paraphrase what is in the log book and tell us what occurred?

Mr. Cunningham: It is all right with me. He has already read from it. I assumed he was trying to translate exactly what is in it.

Mr. Watson: Well, there were 6 or 7 lines of it, and here we have 3 pages.

I have here an English translation of the log. I do not vouch for it. I do not know who did it. If you are trying to find out what is in the log book for the purpose of questioning the captain, I am willing to let you read it, providing that nobody is agreeing this is an official translation, because, as I say, I don't know who did it.

Mr. Garber: That is agreeable with me.

Mr. Cunningham: All he did is offer you the right to read it. I do not have to agree to it.

Mr. Garber: I am assuming he is offering you the same right.

Mr. Cunningham: Yes, but I am not agreeing it is an official or non-official translation. I just don't know.

Mr. Watson: I would rather have it that way than have

the captain attempt to translate the whole thing, which is a difficult matter.

Q. After the pump is placed how is it hooked up?

Mr. Watson: Now, are you referring to this particular specific instance, or are you referring to general operations?

Mr. Garber: General operation.

[fol. 90] A. In the general operation the pump is just placed on the top of the lid and the hoses are just connected to the pump.

Q. What hoses do you mean?

A. One hose going down into the tank and one going ashore, and then the steam hose for supplying steam to the pump.

Q. Now, the hose going down into the tank, is that a permanent fixture of the ship?

A. That belongs to the shore equipment.

Q. What is that hose made of?

A. Well, I don't know. It is just a regular oil hose.

Q. And the hose that leads from the pump ashore, is that part of the ship's equipment?

A. No.

Q. Who does that belong to?

A. I don't know who it belonged to, but it belonged to the pump equipment, and it is brought from ashore.

Q. And how about the steam hose?

A. That is supplied from ashore.

Q. Is the steam also supplied from ashore?

A. Yes.

Q. Do you know what the purpose of the steam is?

A. To run the pump.

Q. Captain, does the ship carry sand or sawdust?

A. Yes and no. Sometimes we have sawdust on board and sometimes not.

Sand we usually keep for putting down small fires.

Q. Is sand always carried on the vessel?

A. Yes.

Q. And when sawdust is carried on the vessel, for what purpose is it carried?

A. Well, we use sawdust to put in the holds if it is wet down there to dry up.

[fol. 91] Q. To dry what up?

A. The water. If it is raining we put down sawdust to dry up that water. And if oil is spilled we put it down there to dry up the oil.

Q. Is there any particular quantity of sawdust that is usually carried with the vessel?

A. No.

Q. Is there any particular person or member of the crew who uses the sawdust?

A. No.

Q. Well, ordinarily who would use it?

A. Anybody that has the orders to use it from the officer in charge.

Q. I understand then that it would be the officer in charge. Would he be the officer on watch or the chief mate?

A. It would be the officer on watch.

Q. And would he order the use of sawdust on any occasions? A. Yes, if he thinks it is necessary.

Q. Who would he order to use the sawdust?

A. Well, I don't know. I can't say. That is an answer that I can't give you.

Q. Is there any other officer or member of the ship's crew who works with the officer on watch for that purpose?

A. No.

Q. Does the ship carry a bosun?

A. Yes.

Q. And what are the bosun's duties?

A. The bosun's duties, to explain it, he is on the ship like a foreman is ashore. He gets his orders from the chief officer, and he gives those orders again to the crew, and he sees that the crew does it.

Q. And is the bosun considered the assistant of the officer on watch?

A. No.

Q. Does the officer on watch have any members of the crew under his jurisdiction?

A. Only if he needs them. He can take out any member of the crew if he thinks he has to use them.

[fol. 92] Q. On December 4th, 5th and 6th, 1952 was the vessel carrying sawdust?

A. I don't know.

Q. Was the vessel carrying sand?

A. Yes.

Q. Would there be any record that you can refer to to tell us whether the vessel carried sawdust at that time?

A. The ship didn't carry sawdust. I didn't know anything about it. But she carried sand.

Q. You say that the MV Tungus did not carry sawdust?

A. I said I didn't know. I can't tell now after all these years.

Q. I understand that there would be no record that you could refer to to tell us whether the ship carried sawdust or not?

A. No.

Q. Is sand used when an oil spillage occurs on the ship?

A. I would say no.

Q. Can you tell us what the procedure was on board the Tungus——

A. [Interposing] No.

Q. [Continuing] In 1952 when an oil spillage occurred?

A. No.

Q. You are not familiar with that?

A. No.

Q. Do you know, captain, whether any sand or any sawdust was used on December 6, 1952 in the number 3 hatch——

A. [Interposing] No.

Q. [Continuing] Of the Tungus?

A. No.

Q. When you arrived in that area, I believe you told us the next morning, was there any sand or sawdust in the vicinity?

A. I can't remember now.

Q. How as (sic) the ship docked?

A. It was docked along the pier starboard side to.

Q. Would that put you bow in or out?

A. Bow in.

[fol. 93] Q. While the discharge operation is being performed, captain, is the list of the vessel affected? I am referring to a discharge of oil.

A. Yes.

Q. Was there a list of the vessel on December 6, 1952 while discharging was going on?

A. I don't know. I was not present.

Q. Is there any procedure on board the ship to control the list of the vessel?

A. They can shift fuel oil from one side to the other.

Q. Is that done while discharging is going on?

A. Yes.

Q. Was that being done on December 6?

A. Yes.

Q. What fuel oil was being shifted?

A. I don't know.

Q. And was the purpose of shifting the fuel oil to keep the vessel on an even keel?

A. Yes.

Mr. Garber: That is all at this time.

Mr. Cunningham: Do you have any cross examination now, sir?

Mr. Watson: No.

Examination by Mr. Cunningham:

Q. Captain, how old are you?

A. I am 44.

Q. How long have you been going to sea?

A. Since 1927.

Q. Did you carry up through the forecastle as we say?

A. Yes. I started as a deck boy in Wilhelm Wilhelemsen in 1927, and went all the way up.

Q. How long were you employed on the MV Tungus after January, 1955?

A. Until June 22.

Q. Of this year?

A. Yes.

Q. From the time of this accident, how long have you been off the Tungus? Let us put it that way.

[fol. 94] A. From 1954, August, until January, 1955.

Q. How long before this accident had you been on the Tungus as master?

A. Since August, 1951 until the accident happened.

Q. Had you worked on the vessel before in any other capacity?

A. As a captain, and on the previous ship too.

Q. No. On the Tungus I mean. Had you been an officer on the Tungus or only as captain?

A. No. I only had been employed there as captain.

Q. Referring to Libelant's Exhibit 5, which is this photograph, can you tell us, captain, whether or not these tanks, the tops which are shown here, go from one side of the vessel all the way to the other side? In other words, skin to skin.

A. You can't see this on this picture.

Q. No. You can't see it, but I am asking you what is underneath. Does the tank extend from the skin on the starboard side to the skin on the port side?

A. There is a bulkhead in the middle.

Q. Just answer my question. Is the entire ship from one side to the other taken up with these two tanks?

A. Yes.

Q. In other words, these tops only show a small portion. It is wider underneath?

A. Yes, that is right.

Q. Now, in this photograph as shown, there are two objects which are lying between the port and starboard tank?

A. Yes.

Q. Are those the two hatch beams which are used when dry cargo is put into these tanks?

A. Yes.

Q. Now at the time of this accident, captain, do you know whether the main deck hatch covers had been removed?

A. No, I don't know.

Q. Well, when you arrived in the Bayonne pier of the El [fol. 95] Dorado Oil Works, did you arrive with your main deck covers on?

A. Yes.

Q. Did you remove, or I mean, did the ship's crew remove any of the main deck covers before the discharging operation began?

A. They had to do that in order to get the lids up

Q. Can you answer my question. When this discharging was going on had the main deck hatch covers been removed?

A. I didn't know that when the discharging was going on.

Q. In other words, when the port lid was being moved from its position covering the entire opening to the position which is shown in Libelant's Exhibit 5, during that time, they would have to remove the main deck covers?

A. Yes, the after part of them.

Q. Only part of them?

A. The after part.

Q. And that is because the falls on the deck would have to go down onto the cover?

A. Yes.

Q. And that was done by whom?

A. By the crew.

Q. Were you on board during the time this was being done?

A. I was on board but I didn't see it.

Q. I didn't ask you that.

All I want to know is whether you were on board?

A. I was on board, yes.

Q. Were you on board when the vessel shifted from Brooklyn to Bayonne?

A. Yes.

Q. I wish you would go back to Cebu in the Philippines where this cargo was loaded. Did you load coconut oil cargo in both the starboard and port number 3 tanks?

A. Yes.

Q. Are there any other tanks on the vessel similar to these two tanks shown in this photograph, Libelant's Exhibit 5?

A. No.

[fol. 96] Q. When this cargo was being loaded in Cebu. was there any cargo in the twain deck?

A. I can't remember that now, but it was not on top of the tanks.

Q. When the cargo is loaded do you turn the lids the way the port lid has been turned in Libelant's Exhibit 5?

A. No.

Q. How is that operation carried out, sir?

A. That is carried out with the lids permanently on, and the oil is brought down to the wharf in trucks, with a big tank on the truck, and they have a pump on the wharf that pumps the oil through the hose, which goes over the hatch coaming down the manhole into the lid and right into the tank.

Q. What size hose do they use in loading, sir?

A. I don't know that.

Q. Well, have you seen it done?

A. Yes.

Q. Well, can you tell us approximately?

A. About that size [indicating].

Mr. Watson: Would you say about 8 inches?

The Witness: About 6 inches in diameter I think is the size hose.

Q. Will you point out in this photograph the manhole through which the cargo is loaded?

A. There and there [indicating].

Q. Would you mark each of those with an "M" for manhole?

A. Yes [indicating].

Q. As I understand it, then, sir, the lids are not moved at all from their closed position during the loading of the cargo?

A. No.

Q. When I say cargo I mean the coconut oil cargo.

A. Yes.

Q. After you left Cebu did you go to other ports in which [fol. 97] places cargo was loaded in the tween deck on top of the tank tops?

A. Yes.

Q. And when I say tween deck I have in mind—whether I am referring to the right area I don't know—but I have in mind this deck as shown in Libelant's Exhibit 5.

A. Yes.

Q. Is that the tween deck?

A. Yes, upper tween deck.

Q. In other words, in the other holds there is no tank but there is an upper and lower tween deck and hold?

A. In number one, two and three. And in number five there is only one deck.

Q. In number three, if we were to look down into this tank would we see this broken up into compartments of an upper and lower tank?

A. Yes.

Q. Was this oil in the lower or upper tank?

A. It was only one tank because there is—there is no lid between the upper and lower tank.

Q. Is there a bulkhead running between the upper and lower tank of any kind separating the upper from the lower?

A. There is a deck.

Q. Will you describe that for us? Do you mean a steel deck?

A. Yes.

Q. Does that steel deck separate the upper from the lower tank?

A. Yes.

Q. Is there any connection between the upper and lower tank?

A. There is an opening exactly the same size as the top opening.

Q. There is an opening exactly the same size as the lids which are shown in Exhibit 5?

A. Yes. This is the opening [indicating].

[fol. 98] Q. When I asked you before I wanted to know whether the oil that was being discharged at Bayonne was oil that had been in the upper and lower tank?

A. In both. There is no separation.

Q. As I understand it, captain, the separation between the lower and upper tank in number 3 is not a complete separation? Is that correct?

A. Yes.

Q. In other words, it has a deck which covers only part of the area between those tanks?

A. Yes.

Q. There is always some opening between the lower and upper tank?

A. Yes.

Q. And the size of the opening is identical with the size of the opening on the top?

A. Yes, that is right.

Q. There is no lid on the cover below?

A. No.

Q. Is there any lid supplied to be put on it at any time? In other words, can you separate these tanks?

A. Not by a lid.

Q. Can you separate it by anything?

A. On dry cargo we have the wooden hatches.

Q. Well, now, the hose that was used to discharge the cargo at Bayonne, was it about the same size as the hose used to load the cargo, sir?

A. I don't remember, but I guess it would be. It is standard size.

Q. Did you see it?

A. I saw it but I don't remember.

Q. Was it the custom on this vessel to carry liquid cargoes in these two tanks?

A. Yes.

Q. And during your time as master of the vessel I suppose it carried many cargoes similar to this coconut oil?

A. Yes.

Q. Was it always loaded in the same way?

A. Yes.

[fol. 99] Q. Was it always discharged in the same way as they discharged it at Bayonne?

A. Yes.

Q. I refer to Libelant's Exhibit 5, and I refer you to certain covers in the back of the photograph. Are they hatch covers?

A. No.

Q. What are they?

A. They are bottom covers for dry cargo to cover the coils.

Q. In other words, to cover the heating coils in the bottom of this tank?

A. Yes.

Q. Would you mark that please with the letters "BC" for bottom covers?

A. Yes [indicating].

Q. And you are marking it also on the starboard side as well. They are shown as the same covers to cover the tank.

A. Yes, one for each tank.

Q. Now, where was the cargo which was in the tween deck unloaded before the coconut oil was being unloaded at Bayonne?

A. I don't remember that now.

Q. Can you tell us by referring to your log book, sir?

A. No. It wouldn't be in the log.

Q. Well, what ports did you touch after Cebu?

A. The next port was Nasipit.

Q. Where was that, captain?

A. Philippine Islands.

Q. Did you load or discharge?

A. Load.

Q. Did you load anything in the tween deck of number 3?

A. I don't remember that now.

Q. Does the log indicate that now?

A. No.

Q. Can you tell us what kind of cargo was loaded in that tween deck?

A. I don't remember that now.

[fol. 100] Q. Does the log indicate the type of cargo that was loaded there?

A. No.

Q. Is there any record on the ship showing the type of cargo loaded there?

A. These papers are supposed to be kept on the ship only two years. I don't know now and I can't say whether they are still there.

Q. Was this run of the Tungus a tramp run or a regular scheduled run?

A. A regular scheduled run.

Q. Was it the practice to pick up the same type cargo at the ports you visited on this run?

A. Yes.

Q. Can you tell us the cargo that you picked up at this port Nasipit?

A. Lumber.

Q. Where would that ordinarily be stowed?

A. Well, in the decks.
Q. What was the next port?
A. Gingog.
Q. Where is that?
A. In the Philippine Islands.
Q. What did you usually load there?
A. Logs.
Q. Where is that loaded? On deck?
A. No, in the lower holds.
Q. So that couldn't be loaded in the tween deck?
A. No.
Q. What was the next port?
A. Manila.
Q. Did you load or discharge there?
A. Load.
Q. What did you load?
A. Well, general cargo and desiccated coconut.
Q. Dry coconut and general cargo?
A. Desiccated coconut.
Q. What is that?
A. What they eat in the can.
Q. Is it in large bags?
A. Paper bags. That would never have been put there.
[fol. 101] Q. That wouldn't be put on top of the tanks?
A. No.
Q. Can we get to the next port?
A. Hong Kong.
Q. I want to know what might be put on top of these tanks. What was loaded there?
A. General cargo.
Q. And what is the nature of the general cargo at Hong Kong?
A. Rattan furniture. All sorts of general cargo.
Q. Would that be loaded on top of these tanks?
A. It could be, but I don't know whether it was.
Q. Would you insert the hatch beams before you loaded cargo on top of these tanks?
A. Yes.
Q. And under the lids?
A. Yes.
Q. You would?

A. Yes. They would be secured all the time.

Q. You have told us, captain, that when you had oil in these tanks that you didn't use the hatch beams. Is that correct?

A. They are standing between the tank tops, as we call them, and they are secured there.

Q. Yes, I know. But when you load cargo on top of these lids, before you put the cargo in, do you put these hatch beams in?

A. No.

Q. Do you remember when prior to the accident these hatch beams were under the lids?

A. No. I can't remember that.

Q. And when they are removed I presume they are removed by the ship's winches and the derrick?

A. Yes.

Q. Do you know, sir, whether or not the chief officer speaks English?

A. He speaks English.

Q. And does he read and write English?

A. That I can't answer.

[fol. 102] Q. What is his name, sir?

A. Folkmann.

Q. How long has he been with the Tungus?

A. He was with the Tungus for about two years, and he left there August, 1954.

Q. And the third officer, does he speak English?

A. Very little.

Q. Can you recall now what you did this evening?

A. No.

Q. Did you leave the vessel? Do you know?

A. No. I didn't leave the vessel.

Q. Did you accompany the surveyor when he came aboard?

A. No.

Q. Who did?

A. The chief officer.

Q. Just for the sake of the record, suppose you tell us what you mean by ullage.

A. That is the height from the top of the oil to the top of the tank.

Q. Where did you discharge the oil from the starboard tank, sir?

A. Boston.

Q. What was the name of the pier, or can you otherwise describe it, if you can't name it, at which you discharged coconut oil from the starboard tank?

A. It was Proctor (sic) and Gamble plant in Quincy.

Q. What did the surveyor do, if you recollect, when he made a survey of the oil in the port tank?

A. I do not know because I didn't see it.

Q. Do you know what the usual custom is for a surveyor to do?

A. Yes.

Q. What does he usually do?

A. They measure the ullage——

[fol. 103] Q. Yes, I know that, but how does he do that? Does he take the manhole off?

A. He takes samples through the manhole.

Q. How does he test the ullage through the manhole?

A. Then he says if we can lift the tank lid, and then the tank lid is lifted and turned around. And he takes it in four corners of the opening.

Q. When the lid is first moved it is not in the position as shown in Libelant's Exhibit 5?

A. What?

Q. It is not in the position as shown in Libelant's Exhibit 5 when it is first removed?

A. No. It is just lifted and held on to the wire, and then it is placed down.

Q. Had the oil in the starboard tank been discharged before you began to discharge oil at Bayonne?

A. No.

Q. When was that discharged?

A. In Boston.

Q. When? What date?

A. On the 10th. December 10th.

Q. And was that unloaded directly from the starboard tank——

Mr. Cunningham: I withdraw the question.

Q. The lid of the starboard tank had not been removed until you started to discharge cargo in Boston?

A. Yes. Before we sailed from New York half of the starboard tank was pumped into the port tank.

Q. Was that done by removing the starboard lid?

A. No, just the manhole.

Q. Had the oil in the starboard tank been surveyed before this was done?

A. I do not know because I can't find out here [indicating].

Q. In the log book it doesn't indicate whether it was or [fol. 104] was not surveyed?

A. No.

Q. Does the log book indicate whether there was a survey of the port tank?

A. Yes.

Q. Is it usual to place in the log reference to the fact that a survey has been made?

A. Yes.

Q. You do not know the capacity of these tanks, do you, sir?

A. They are a little over twelve hundred tons salt water.

Q. How would that compare with their capacity of coconut oil?

A. It would be between a thousand and eleven hundred tons.

Q. Of coconut oil?

A. Yes.

Q. And you say that the starboard tank had 479 long tons? Is that correct?

A. Yes.

Q. Are you using the same measure when you refer to long tons as when you did when you referred to the capacity of the tanks as being so many tons?

A. I am doing a little guessing. It is just approximate.

Q. My question is when you say you loaded 479 long tons, is that measure of a long ton the same as the measure you're using when you say the capacity of the tank is so many tons?

A. Yes, it would be, if I remember the correct number of tons.

Q. Did you reach any port of discharge before New York?

A. Yes.

Q. Which one?

A. San Francisco, San Pedro.

Q. Did you discharge any cargo from the tween deck of number 3 hatch at either one of those ports?

A. I don't remember that.

Q. Does your log indicate that?

A. No.

[fol. 105] Q. Is there any record kept on the ship as to the places where cargo is discharged?

A. Yes. As I told you, these were kept on the ship for only two years, but we may have them more than that.

Q. I do not believe it is on the record, but you mentioned off the record the fact that the chief officer had signed the log book for the days on which entries were made concerning this accident.

A. The log books are signed by both the chief officer and myself.

Q. But he signed the entries we are referring to with respect to the accident?

A. Yes.

Q. Has he signed those entries in just a pro forma manner or has he signed them indicating he made the entries?

A. The chief officer always writes the log book and signs them.

Q. Who makes the entries in the rough log?

A. That is the second mate.

Q. In the rough log you have entries made by the second mate concerning this accident?

A. I can't tell you that, but they usually are exactly the same.

Q. I am not interested in that. I assume they are the same.

A. I don't know.

Q. Is it the practice on the Tungus for one mate to ordinarily make the entries in the rough log?

A. Yes.

Q. And that is the second officer?

A. In port, yes.

Q. Well, do you have what we call sea watches and port watches?

A. Sea watches.

Q. During the time that the vessel is in port and during the time the accident occurred would there be any specific men assigned to watch during the evening?

A. Yes.

Q. Who would they be?

A. On that special night I don't know. I know the third [fol. 106] mate was on from midnight of the 6th.

Q. How long would his watch be? Would it be from midnight to 8 o'clock in the morning?

A. Yes.

Q. And there would be somebody else on from 4 in the evening until midnight?

A. Yes. These watches are divided between the second and third.

Q. Do you have a fourth mate on board?

A. No.

Q. When is the chief officer on duty during port time?

A. He is on duty as long as he stays on the ship. He doesn't go on any particular watches.

Q. His duties principally had to do with the loading and unloading of cargo?

A. Yes.

Q. Have you any personal knowledge of the facts that are entered in the log book concerning the accident?

A. What was that?

Q. Have you any personal knowledge of the facts entered in the log book concerning this accident?

A. None at all.

Q. Have you read the entry in the log book before this day?

A. Yes.

Q. And you understand it?

A. Yes.

Q. You know that all the facts that are entered there—you have no personal knowledge of any of them?

A. No.

Q. Now, do you know who does have personal knowledge of the entries in the log?

A. The officer on watch at the time of the accident.

Q. That would be the third officer?

A. The third officer.

Q. Now, are you telling us that because of the fact that [fol. 107] he was on watch, or is there anything in the log, either rough or smooth, which indicates that he knows anything concerning the accident?

A. It indicates in the log book that the third officer was on watch from midnight.

Q. The chief officer was also on watch, so to speak.

A. Even though he is in bed he is on watch. He is responsible all the time. He is called out whenever it is necessary.

Q. You were not disturbed during the night?

A. No.

Q. Do you know of your own knowledge when the cover was placed in position—when the lid as you call it was placed in the position as indicated on Libelant's Exhibit 5? I am speaking of the port lid of course.

A. No.

Q. Do you have any knowledge of your own as to when the pump was placed?

A. No.

Q. Do you know of your own knowledge where the pump was placed?

A. Yes. The top of the lid.

Q. Did you see it there?

A. Yes.

Q. You saw it there when?

A. The next morning, but then there was no operation going on at that time.

Q. But you saw it placed somewhere the next morning?

A. Yes.

Q. Where was it placed?

A. On top of the lid.

Q. Which lid?

A. On the port.

Q. On top of the lid that is placed athwartships?

A. Yes.

Q. Do you know who placed it there?

A. No.

Q. Do you know who was operating the ship's winches that evening?

A. No.

[fol. 108] Q. Didn't you say that it was the ship's crew that moved the lid?

Mr. Watson: Are you asking him of his own personal knowledge, because in the previous question he answered of his own personal knowledge, although he had answered it differently from the log before, so make it clear for the captain.

Q. I want to know if you recollect from your own knowledge of the fact that this port lid was lifted up and turned and placed in this position?

A. No, I do not.

Q. The only thing you know is what you saw the next morning?

A. Yes.

Q. Do you know of your own personal knowledge who manipulated the controls of the winch when this particular lid was lifted?

A. No.

Q. Is there any indication in the log informing us or informing anyone as to who lifted the port lid?

A. The crew did.

Q. The crew did, from the log book you tell us?

A. Yes.

Q. Who was in charge at that time?

A. Well, that I don't know.

Q. Reference is made in the log to a watch crew. Do you know who ordinarily composes the watch crew?

A. This is a man at the gangway in this case.

Q. I am not asking about in this case. I am trying to find out ordinarily.

A. That is ordinarily too.

Q. So when the log has reference to a watch crew they refer to one man ordinarily?

A. Yes.

Q. Now, I want to know of your own personal knowledge [fol. 109] whether you know whether it was only one man or were there more men this night composing the watch crew?

A. No.

Q. You don't know?

A. No.

Q. Does the third officer ever make entries in the rough log?

A. No, not in port.

Q. In instances where the second officer is not on duty, who makes entries in the rough log?

A. The officer on duty, like the third officer, he writes what is going on in a notebook, and when the second officer comes on, the second officer will write it in dictated by the third officer.

Q. In other words, the third officer makes an entry in his own notebook and it is transferred from that notebook into the rough log by the second officer?

A. Yes.

Q. And then in turn the chief officer translates it from the rough log to the smooth log?

A. Yes.

Q. So what we have here is the third officer's——

A. In this case the chief officer was there himself.

Q. In this case what you have referred to in the log is the copying of the entry made by the third officer in the rough log by the chief officer?

A. No.

Q. Then explain what this log entry is.

Mr. Watson: May I ask that you specify as to what portion of the log you are referring to.

Mr. Cunningham: I mean the entry concerning the accident.

Mr. Watson: Starting at what time?

Mr. Cunningham: Starting at the time the captain read on the 6th of December, 1952. The pages that you referred [fol. 110] to before. Do you know what I mean?

Do you understand my question?

The Witness: No, I do not.

Q. A short time ago, on Mr. Garber's examination you referred to certain pages in the log as containing an entry relating to the accident.

A. Yes.

Q. Now, would you explain to us, please, how that entry got there? In other words, did it get there——

A. [Interposing] I don't know.

Q. Well, is there any indication that that entry got there in a different manner than ordinary entries?

A. No.

Q. Captain, have you made any statement concerning this accident?

A. No.

Q. Did you sign any statements which were made by other people that you can remember?

A. No. I only signed the log book. That is the only thing I signed—an extract from the log book.

Q. That was the English extract from the log?

A. Yes.

Q. Where are the tanks holding the fuel oil in the Tungus?

A. In the bottom.

Q. They are bottom tanks?

A. Yes.

Q. They run all along the bottom from forward to aft?

A. Yes.

Q. Are those tanks in which the fuel oil was shifted?

A. Yes.

Q. In order to even the trim of the ship?

A. Yes.

Q. Was that done at exactly the same time as the oil was being discharged?

A. Yes. It was done as necessary during discharging.

[fol. 111] Q. Now, who was on duty to take care of that?

A. That I don't remember now.

Q. That would be certain engineering officers?

A. Yes.

Q. And who would tell the engineering officers when to transfer the fuel oil?

A. They would see that themselves when it was necessary.

Q. Well, how could you tell when it was necessary?

A. They have an inclinometer in the engine room, and when the ship starts getting a list, they would see it down there right away.

Q. Does the deck log show any transferring of oil from one tank to another?

A. No.

Q. Was an entry made to your knowledge in any log indicating the time when the transfer of the fuel oil took place?

A. I do not know about that.

Q. Is it the custom on your ship to make such entries in any log?

A. In the engine log.

Q. Do you know whether or not any of the El Dorado employees were on the vessel anywhere at the time that the discharging of the coconut oil began?

A. I do not know that.

Q. You have no knowledge of that?

A. I have no knowledge about it, except what is written down in the log book.

Q. You didn't watch the surveyor make his tests?

A. No.

Q. You didn't watch the chief officer supervise the discharge of the cargo?

A. No.

Q. Do you know how long the cargo had been discharged from the tween deck before you arrived at Bayonne?

A. No.

[fol. 112] Q. Is there any record on the ship indicating that?

A. No.

Q. Is it possible that the tween deck cargo had been discharged at San Francisco?

A. At any port it could have been.

Q. Well, the first port of discharge was the west coast of the United States?

A. Yes, San Francisco. It could have been discharged in either of three ports, San Francisco, San Pedro, and Cristobal.

Q. You stopped at San Pedro?

A. Yes.

Q. In any of the ports on the west coast of the United States, did you load?

A. No.

Q. Do your logs indicate what the free board was amidships at the time you entered the Bayonne pier of El Dorado?

A. No.

Q. Is there any record on the ship which tells us how deep you were in the water when you came into Bayonne?

A. Yes.

Q. You are opening the log book at a place where that information would be found?

A. Yes.

Q. Would you tell us please what the depths were when you entered the El Dorado oil pier on December 5, at Bayonne?

A. Fifteen feet three inches forward and twenty-one feet six inches aft.

Q. Do you keep it midships too?

A. No. We haven't got it midships.

Q. What was the draft upon leaving the pier at Bayonne?

A. Fifteen forward and twenty aft.

Q. Just to make the record complete, captain, would you describe this vessel, its tonnage and type?

[fol. 113] A. Yes. It is a regular cargo ship. Its tonnage is 9,270 dead weight, 5,499 gross, 3,143 net. It is 463 feet long and 62 feet wide.

Q. That is at the beam?

A. And she is twenty-six feet and five and one half inches loaded.

Q. Her draft is twenty-six feet five and a half inches amidships?

A. Loaded.

Q. Amidships?

A. Yes. We call it the mean draft.

Q. You don't keep any mean draft in the log though?

A. No.

Mr. Garber: Do you have any cross examination?

Mr. Watson: No.

Examination by Mr. Garber [Continued]:

Q. On December 6, 1952 were there any railings or guards around the tank opening of the port tank?

A. No.

Mr. Garber: That is all.
Mr. Watson: No questions.

Examination by Mr. Cunningham [Continued]:

Q. Who would know whether there were any ship's crew members or officers in the number 3 tween deck during the discharge of this oil from the port tank?

The Witness: Will you please repeat that?
Mr. Cunningham: Yes.

Q. Who would know whether there were any ship's crew or ship's officers in the number 3 tween deck during the discharge of this coconut oil from the number 3 tank?
A. The chief officer.

Mr. Cunningham: No further questions.

[fol. 114]

IN UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil 12-55

OLGA SKOVGAARD, Administratrix,

vs.

THE VESSEL "MV" TUNGUS, et al

Newark, N. J.

Transcript of Proceedings—November 3, 1955

Before The Honorable Alfred E. Modarelli, U.S.D.J.

APPEARANCES:

Baker, Garber & Chazen, Proctors for Libellant, By: Nathan Baker, William George and John J. Lemken.

McAleer, Connell & Corridon, Proctors for Respondents, By: Haight, Gardner, Poor & Havens, J. Ward O'Neill (N. Y. Bar) and David P. H. Watson (N. Y. Bar), Of Counsel.

Wilbur A. Stevens, Proctor for Respondent-Impleaded; By: Kirlin, Campbell & Keating, Joseph M. Cunningham (N. Y. Bar) and Robert P. Hart (N. Y. Bar), Of Counsel.

[fol. 115] The Court: Gentlemen, I received the memorandums, but they are all here late, in violation of local rule of court 11(c). I am supposed to have the plaintiff's memorandum 10 days after the pre-trial conference and the respondent's memorandum five days thereafter.

I have had no opportunity to go over your memorandums, I am sorry. They may be excellent. But, as you know, yesterday I was very busy with the Westinghouse Electric strike case, so you will have to go along very nicely, very quietly and very patiently. I shall try to absorb the contents of these good memorandums as soon as possible.

So that you all know, I am not going to hold you in contempt, I am not going to fine you, for handing them in late, because I know you gentlemen are very busy, too—very busy.

Now, you are all experts, I take it, in admiralty law, except Mr. George and Judge Modarelli here, who are both willing to be shown all you know about admiralty law.

The first problem we have here is: Do we proceed under the New Jersey State Death Act, do we proceed under maritime law, or do we proceed under both?

First I want to hear from the plaintiff. It is your case. I am sure you know what to do.

Mr. Baker: Yes, your Honor.

If your Honor please, I would like to ascertain from your Honor first as to the type of an opening I am to make. Since you are sitting here as the trier of the fact and of the law in an admiralty proceeding, would you like me to make a full opening as to the facts?

[fol. 116] The Court: No, I have gone over the facts very carefully. I know generally what the case is about now, factually. But I am interested—because of the slight opportunity I had to go over the memorandums, it indicates that you and your adversaries don't agree on certain points. Isn't that true?

Mr. Baker: Law points.

The Court: Yes.

Mr. Baker: Well, we don't agree because certain parts of this admiralty law is unsettled.

The Court: I know.

Mr. Baker: And I might state to your Honor that many points that are going to come up in this case—or may come up in this case are unsettled.

The Court: That makes it interesting, very interesting.

Mr. Baker: And they are the subject of discussions in various district courts, and various circuit courts of appeal, and some of them are even being discussed now before the United States Supreme Court.

In fact, the question of the rights between an employer of an injured party, or deceased, who has been impleaded as respondent, and the rights between that employer and the respondent, the owner of the ship, in the Palazollo case, which is a question between the two respondents——

The Court: With which you are not concerned.

Mr. Baker: I am not concerned, but to show you the involved and unsettled status of the law. —that decision was affirmed by a four to four decision of the United States Supreme Court, was just recently argued and is now await-
[fol. 117] ing a decision on that point. That is only one of the arguments. Several of the arguments that may be involved—I say may be—are interesting problems of admiralty law which are undecided.

The Court: Well, that makes it nice. But that is a problem for the respondent and the respondent-impleaded to worry about. Now, how about your problem?

Mr. Baker: Yes, I will be glad to mention it.

The Court: Yes.

Mr. Baker: Did your Honor say I didn't have to go into the facts?

The Court: No, I know pretty much what the facts are.

Mr. Baker: Now, on the legal question involved, on the first question, this case is in admiralty, and admiralty law prevails. That is our contention.

Now, under the admiralty law they take the state law in order to enforce the rights which exist under the state law. In other words, the admiralty law, where there is a death case, takes the state death act and gives the right to recover. There is no question about that.

The Court: Yes.

Mr. Baker: Then the question that comes up is in discussing the substantive points of law, what governs, the admiralty law or the state death act? And it is our contention—and I think that I have the United States Supreme Court behind me, not on this particular state of facts, but on general statements of law—and I am referring now to the Hawn case, which I have cited in my brief, on a different proposition which is very important here, but on this point of the question, in the Hawn case they have [fol. 118] indicated—and I wonder if I have it here, I can read part of it—but I don't think it is necessary at this time.

The Court: No, you speak generally.

Mr. Baker: They indicated in that case—and that is in the Supreme Court—that where the admiralty has jurisdiction, and takes the cause of action under a state law, it is still the admiralty law that governs—admiralty principles govern. That is what they say, admiralty principles govern.

Now, under the situation we have here, we have first of all the admiralty case, which governs with admiralty principles. The admiralty then takes the state death act in order to give this cause of action by reason of the death of the deceased.

Now, the question arises—or may arise—we sue under two causes of action, one for negligence and one for unseaworthiness.

Under negligence, there is no question that the New Jersey State Death Act gives a cause of action. We don't have to argue that.

The Court: No.

Mr. Baker: But the question remains, does it give a cause of action for unseaworthiness, because the State Death Act says—by reason of the negligent act, default or wrongful act of the party, and so forth—I am not reading the Act right now, but those are the terms. It doesn't use the word "unseaworthiness". And does it mean "unseaworthiness" to come under the State Death Act?

Now, number one, we expect to prove negligence, because we will show that this ship had notice of these negligent

[fol. 119] conditions. Therefore, unseaworthiness will not come into the case. But under unseaworthiness we don't have to show notice. For instance, a slippery deck, oil on the deck—you don't need notice. We happen to have notice.

So that the question of unseaworthiness may not come into your Honor's decision. But if it does—if it does—your Honor is then faced with the interesting proposition, which is undecided, as to whether or not unseaworthiness comes within the New Jersey Death Act.

However, I can give your Honor a little help from a dicta decision by Judge Learned Hand, in the Gill case, which I have cited here, and in that dicta—although it had nothing to do with the case, and it was a dissenting opinion yet, in a dicta——

The Court: That is why it can't be law, isn't that so? It may be some day.

Mr. Baker: It was a dissenting opinion, a dicta, but Learned Hand is considered one of the outstanding men on the bench, Circuit Court of Appeals bench, and he still sits there—he is retired, but he still sits, and his opinions are well thought of—but in that dicta he indicated that, in his opinion, unseaworthiness does come within the New Jersey Death Act, because the Gill case is one that happened in Hoboken, too, I think.

The Court: Yes, it did.

Mr. Baker: It wasn't my case.

The Court: But there he was in the minority, he dissented. But you hope that will be the majority opinion some day and the prevailing opinion.

Mr. Baker: I think that in the event your Honor does [fol. 120] have to go into the question of unseaworthiness as one of the points involved that, in my opinion, after considering all of the law—not that your Honor will follow that dicta, but you would give great weight to it, plus your Honor's independent judgment. And it is my opinion that unseaworthiness does come within the New Jersey Death Act.

It seems quite unusual that there was a convention not so long ago in Atlantic City where that was the point of my lecture. I didn't realize at that time that it would be coming up in a case where I, myself, would be concerned.

I didn't know it at that time, but I knew that it would come up some day.

The Court: Those are the vagaries of the law profession. I have seen lawyers who were met with their own writings in lost cases. They forgot that they had written contrary at one time. I am sorry we don't have a transcript of your lecture. Maybe I could throw some of your own arguments back at you. It will be published, won't it?

Mr. Baker: The transcript of my lecture I think is published, but it is embodied in this brief, in my argument in this brief, under point 6, your Honor.

The Court: Yes, sir.

Mr. Baker: It is a legal argument which I don't think your Honor would want to hear at this time.

The Court: No, not now. The point I want now is that you think you can prevail on the count of negligence because you can surely show notice, is that right, or you feel you can?

Mr. Baker: Yes, sir.

The Court: So that the question of unseaworthiness may [fol. 121] not be involved in this particular litigation.

Mr. Baker: It may not.

The Court: It may not.

Mr. Baker: It may not be necessary.

The Court: All right. That is what I want to know.

Mr. Baker: In the event that it is, I submit that under the law which I have stated, and I have argued it at great length under that point 6——

The Court: I notice that.

Mr. Baker: —and at the proper time, your Honor, I would like to develop that legal argument.

The Court: You may, certainly.

Mr. Baker: At the proper time, at the end of the case.

The Court: All right.

Mr. Baker: Because it is a very interesting point.

The Court: I could say to counsel for the respondents that I don't believe you agree with Judge Hand's dissent.

Mr. O'Neill: There are many of his opinions, sir, that we don't agree with. And in this one Learned Hand just sort of wanders off, after the case was decided, you might say looking forward to what may happen some day, but

also intimated very strongly that a bill before the legislature would take care of that.

The Court: Yes, I think I do recall that, too, that he thought it was an appropriate subject for legislative action rather than judicial action.

Then you will proceed first on the theory of negligence, is that right, sir?

Mr. Baker: Well, we are proceeding with our proof.

[fol. 122] The Court: You mean they may intertwine?

Mr. Baker: They do intertwine.

The Court: All right.

Mr. Baker: And although there was a difference of opinion at one time as to whether or not you had to make a choice, now you don't have to, you can proceed on both theories.

The Court: You know, it is a strange thing, while I am not profound in admiralty law—because I am not even a good swimmer, I might as well tell you that—I always was under the impression that there was a decision in the Third Circuit, written by Chief Judge Biggs, in which I thought he made it abundantly clear. It may apply to a Pennsylvania statute, I don't know, which is similar to the New Jersey statute.

Mr. Watson: That's in our brief, your Honor.

The Court: My recollection was that he said you had to proceed under the negligence theory in a case of this kind.

New Jersey seems to have nothing in point yet and maybe there is a reason why the legislature doesn't include the word "unseaworthiness" in the Death Act. Maybe—I don't know. But we will proceed and see what develops. If you want to make law, it is all right with me.

Mr. Baker: There are other legal propositions involved. I don't know if it is necessary at this time to go into them.

The Court: What is it? I will tell you if I want it or not.

Mr. Baker: For instance, the rights of this man, who was not a seaman, as to whether or not——

The Court: Let's not discuss that now. You can raise [fol. 123] that at the right time and place, if you intend to. I know that in some cases they make seamen out of carpenters, and seamen out of electricians.

By the way, did you read the interesting article in the American Bar Journal in which somebody formalized what I have said here several times about the seamen being the wards of the court? Read it. It is very interesting. I have said that several times from this bench. Now that they have these fine unions, and fine lawyers representing the unions, I don't think the seamen need so much protection from the courts. They seem to come here well protected.

(Remarks off the record.)

Mr. Baker: We also have the interesting question here—I think I ought to bring it out—that the development of the law through the United States Supreme Court where they extended the right to seamen under the Sieracki case—the longshoremen—then they extended it now to people engaged in, even, repairing ships.

The Court: I know all about it, sir. I am familiar with the philosophy of the Supreme Court.

Mr. O'Neill: I am not admitted, so I am going to ask Mr. Baker to move my admission for the purpose of this case.

Mr. Baker: Yes. I would like to move at this time, your Honor, that Mr. Ward O'Neill, whom I have known for many years, and one of the prominent admiralty lawyers of the State of New York, against whom I fought the case of Anderson against Lorentzen many years ago, which is now very famous law, admiralty law—he was my opponent [fol. 124] that time—and it is quoted every time you look at a case. It is quoted in our brief, it is quoted in their brief. It is a very famous case.

The Court: You are a member of the New York Bar, Mr. O'Neill?

Mr. O'Neill: Yes, sir.

The Court: Do we have your office address?

Mr. O'Neill: 80 Broad Street.

The Court: Well, it is my pleasure to admit such a distinguished member of the New York Bar for this case.

Mr. O'Neill: Thank you very much.

Your Honor, in this case we just have to look at the common law, and there wasn't any right of action for death

in the common law. And as the maritime law advanced there wasn't any right for death there.

Then we had these various acts for the benefit of seamen and maritime workers, and the net result was that the courts held that the states still reserved unto themselves the right over death actions in their particular jurisdictions.

Now, we do have the Death on the High Seas Act, which, of course, is not involved here. And there are many cases all the way along the coast, and even inland, which hold that in any case where a maritime worker is injured, unless the state law gives him a right of action, he has no cause of action. And it has also been universally held that unseaworthiness doesn't come into a death action.

Now, in reading Mr. Baker's brief, there are many of these cases that involve personal injuries. They are not death cases. They are entirely different. The law is dif- [fol. 125] ferent on them.

We say here that the Death Statute of New Jersey gives the Admiralty Court jurisdiction. And the Admiralty Court, having taken that jurisdiction, will apply the State Law of New Jersey.

Now, there is nothing here in these other cases but personal injury. They are not involved here at all. They are out of the picture entirely and I think we can discard them here.

Now, this talk about maritime workers, and what they do—I think your Honor will find that every single worker that has recovered against a ship has been repairing ship's equipment, has been working on ship's equipment, has been brought on the ship to do something for the ship. And that isn't the situation here. I am not going into the facts. I will stick to the law, as your Honor said we should.

Now, the injury cases, as I said before, they give a concurrent remedy. In other words, if this man had been injured, we wouldn't be talking about the substantive law of the State of New Jersey, we would be under the general maritime law, which would give him his right of action. Now, I think, sir, that we can limit ourselves throughout the trial to just that point, and the law as it is enforced in this state, under the Death Act of New Jersey.

Now, we also say, sir—I don't know whether you want to hear about the claim over, or whether you prefer to wait until we have had some testimony—but on that we just say that if we are held liable in this case, we are merely passive, we had nothing to do with it, and that the em-[fol. 126] ployer was the active party, and the party that caused the death and that they are responsible actively.

Mr. Cunningham: Does Mr. Baker wish to introduce me?

Mr. Baker: I would also like to take this opportunity to introduce Mr. Joseph Cunningham of the big firm of Kirlin, Campbell & Keating—also a distinguished lawyer.

The reason I didn't mention that, your Honor, I knew that he has been before you in another matter and I thought that he had been fully and properly introduced.

Mr. Cunningham: For the record, your Honor, I am not a member of the Bar of the State of New Jersey and I thought it proper to be introduced again.

The Court: That's right. He is a member of the New York Bar and he, too, is an eminent man in this field. I am pleased to admit you for this case, too.

(Remarks off the record.)

Mr. Cunningham: If your Honor please, I think the important point in the case is the history of wrongful death actions, which has been touched upon by both Mr. Baker and Mr. O'Neill.

As your Honor knows, actions for wrongful death were not recognized in the common law, nor were they recognized in the maritime law. There must be a statute, either under the common law or under the maritime law, in order to enable an action for wrongful death to be brought.

When the cases for wrongful death were brought before the Supreme Court in maritime law cases the Supreme Court in Harrisburg said, "We are sorry, there is no action [fol. 127] for wrongful death," and sent the people out.

Thereafter Congress passed statutes to give actions for wrongful death to various people. For instance, they passed the Jones Act, giving a cause of action for wrongful death to seamen. They passed the Death on the High Seas Act, giving an action for wrongful death to those people who were killed beyond three marine leagues from shore.

But when you come within the boundaries of the state, and this, of course, occurred within the boundaries of the State of New Jersey—then the Supreme Court said, "We know that there is no action for wrongful death in admiralty. However, we are going to adopt the state death act in the cases where it occurs within the boundaries of a state."

Now, in order to benefit by the state death act the one who wishes to use it must also take the act with its limitations and obligations—as the courts say, it takes it cum onere.

Now, one of the limitations in the State Death Act of New Jersey is that in order to recover an act must be a negligent one, it must be a wrongful act, neglect or default. That's important in the case over against us, against El Dorado, because if the libellant proves the respondent guilty of negligence, then the respondent is not in the position of being held liable because of any constructive negligence, or because of its status as a shipowner, as it may have been if it had been held liable for unseaworthiness.

In other words, a shipowner, even though he is not negligent, may be liable for unseaworthiness. And I dare say [fol. 128] if a person caused a vessel to be unseaworthy, and the shipowner had nothing to do with the unseaworthy condition, then he would be liable because of no negligence of his own, but because of his status as a shipowner.

Now, if the libellant cannot recover against the respondent because of unseaworthiness, that eliminates from the case our obligation to the respondent to indemnify him because of his being held liable, because merely of his status and not because of his negligence.

Now, there is no contract between the parties here. It is not like other cases where there has been a promise to indemnify. If the respondent-impleaded is going to be held liable over to the respondent it must be because of some constructive negligence on the part of the respondent.

The United States Supreme Court in the Halcyon case, with which your Honor is familiar, has held that there may not be a quantitative determination of negligence in admiralty. In other words, in the Halcyon case the jury—

it was an action at law, by the way—the jury said, "We are going to find that the respondent-impleaded was 75 per cent negligent and the respondent was 25 per cent negligent." And the Third Circuit said that's proper, "we will allow contribution in admiralty cases."

But the Supreme Court said no—in order to recover over in admiralty—except in collision cases—it must be for indemnity, and we are not going to allow a quantitative determination of negligence. Therefore, if it is not quantitative, it must be qualitative. In other words, there must be some difference in the status between the respondent and the respondent-impleaded.

[fol. 129] But in this case if the libellant proves the respondent negligent, even though it is 25 per cent, 10 per cent, then he may not recover over against us, within the Halcyon case. In other words, no matter how little negligent he is, if he is negligent he can't recover against us. That is what Halcyon said.

Well, if it is 75 per cent and 25 per cent, where are you going to draw the line? The Supreme Court said you may not recover where the respondent-impleaded is 75 per cent negligent. May they recover if the respondent-impleaded is 80 per cent negligent, or 85 per cent negligent? There is no line drawn quantitatively. It must be a qualitative analysis. There must be a difference in the status of the parties.

If, as I say, the respondent was held liable for unseaworthiness, that would be one thing, then he might recover. If he were held responsible because he failed to perform a non-delegable duty which he had given us to perform, then that would be a difference in our status. But here the charge against the libellant, as I understand it, is an omission to do something.

The Court: The charge against the respondent.

Mr. Cunningham: The charge against the respondent, as I understand it, is an omission to do something, a failure to act. And it has been held that the failure to act, the negligence of omission may be active negligence. In other words, the respondent may not say I failed to do something and therefore I may not be held—rather, the respon-

dent may not say: I failed to do something and therefore you must indemnify me because you did something. It is not enough to find a difference in the quantity of the acts of negligence.

[fol. 130] Now, as I say, if the libellant—as I understand Mr. Baker's opening, he is relying principally on the question of negligence and is avoiding the question of unseaworthiness because of the possibility, or the probability, that it doesn't apply under the New Jersey Death Act—if he is relying on negligence then the respondent may not recover over against us because as soon as he proves the respondent negligent, the respondent may not recover over against us, because if he is negligent, and we are negligent, we are joint tortfeasors and there is no contribution in admiralty.

Therefore, that will be the position of the respondent-impleaded in the case.

The Court: I could find that both the respondent and the respondent-impleaded were negligent, is that right, if the facts warrant it?

Mr. Cunningham: If the facts warranted that, and your Honor found that, there could be no indemnity here unless you found that the respondent was liable merely because of its status or because it had asked us to perform one of its duties which were non-delegable. Or there are other examples in the law.

For instance, if an employer hires an employee to drive his car, and the employee is negligent in the operation of the car, then the employer, who is held responsible because of respondeat superior, may, in turn, recover over against the employee. Or if a state act provides that an owner of an automobile is liable merely because of its status as an owner, he may recover over against the person who operated the car.

Now, those situations are situations where the person who seeks indemnity—successfully seeks indemnity—has done nothing wrong, merely because of his status. There-
[fol. 131] fore, if a shipowner, because of his status, is held liable for unseaworthiness, created by someone else, that is a different case than we are dealing with here.

The Court: I see.

Mr. O'Neill: If your Honor pleases, I sort of glossed over that point because I thought we might save that until after the main point.

Now, it is our contention here, sir, that if anything happened, we were passive, for this reason. In the McFall case, which is the leading case on the subject and has been followed in the State of New Jersey, there they held that a steamship owner, because he had a ship on which they put some carbon tetrachloride, and a number of seamen were overcome, was responsible solely because it was there—for no other reason. But they went further and said that the Dow Chemical Company, which had packed these drums and sent it to the ship in drums that were insufficient to contain it, were liable. They also said that the stevedores who had undertaken the loading of that, and who had been told nothing more than to "put it here", that they were likewise responsible, that all the ship did here was that it depended upon this independent contractor. depended upon these people who were supposed to know their business, who had contracted as knowing their business, and therefore they were passively negligent, even though they knew the quality of the merchandise coming aboard, that the same obligation rested upon those who used the carbon tetrachloride, such as Dow Chemical and the stevedores, that they were really the ones who had active control of it, and the shipowner was only carrying it [fol. 132] from New York to Antwerp and discharging, that the loading of that cargo was definitely the job of Dow Chemical and the stevedores.

Now, we say under these circumstances—we have an independent contract with these people. We didn't have the contract. We were told that these people who owned this oil were going to make a special contract with these people to discharge it. It is a special operation. There isn't anything that anybody on our ship knew about it. So if there was anything wrong with this oil, or its quality, or how to handle it, or what to do with it, it certainly was the obligation of these experts that they had down at El Dorado Works, not on our officers, and not on our ship, sir, because we didn't have the equipment to handle it.

The Court: I understand. You may proceed.

Mr. Baker: Mrs. Skovgaard.

OLGA SKOVGAARD, libellant, called and sworn as a witness, testified as follows:

The Clerk: May we have your full name, please.
The Witness: Olga Skovgaard.
The Clerk: Your address for the record.
The Witness: 85 Bostwick Avenue, Jersey City, New Jersey.
The Court: This is a very large courtroom, witnesses and gentlemen. You have to keep your voice up. The acoustics are bad.

Direct examination.

By Mr. Baker:

Q. Mrs. Skovgaard, how old are you?
A. I am forty.
Q. And where do you live at the present time?
A. 85 Bostwick Avenue.
[fol. 133] Q. What city?
A. Jersey City.
Q. And you were married to Carl Skovgaard?
A. That's right.
Q. And could you tell us when you were married to him?
A. I was married in—we were married in 1936.
Q. And is this your certificate of marriage?

[Document shown to the witness.]

A. That's right.

Mr. Baker: I offer it in evidence.
Mr. O'Neill: No objection.
Mr. Cunningham: No objection.
The Court: When I hear "no objection" I assume there is none and the Exhibits will be marked.
The Clerk: L-1, certificate of marriage.

[Received and marked Exhibit L-1.]

Q. And how many children have you?
A. I have three.
Q. Of this marriage?
A. Three.

Q. And would you tell us the name and the age of each of these children?

A. Yes, sir. Christine Skovgaard is four.

Q. She was born?

A. May 12.

Q. 1951?

A. That's right. And Carol was born in 1942.

Q. That's July 21, 1942?

A. '42.

Q. She is how old?

A. She is 13. Mary Elizabeth was born in 1939.

Q. That's June 11 of 1939?

A. June 11, 1939. She is 16.

Q. Are these the birth certificates of the three children? [fol. 134] A. That's right.

Mr. Baker: I offer these three birth certificates in evidence.

Mr. Cunningham: No objection.

The Court: They may be marked.

The Clerk: They will be marked L-2.

[Received and marked Exhibit L-2.]

Q. What was the date of the death of your husband, Carl Skovgaard?

A. December 6, 1952.

Q. And at that time were you living with your husband and your children, three children?

A. That's right.

Q. At the same address you just gave us?

A. Yes.

Q. Were you appointed administrator ad prosequendum and also general administrator of his estate?

A. Yes, I was.

Q. Are these the certificates issued by the Surrogate of Hudson County?

A. Yes.

Mr. Baker: I offer these certificates in evidence.

The Clerk: They will be marked L-3.

[Received and marked Exhibit L-3.]

Q. What was the condition of health of your husband before his death?

A. He was in perfect health.

Q. What was his age at the time of death?

A. Forty-three.

Q. And could you give us a description of him, his height and weight?

A. Well, I think he was six feet, and I think he weighed about 180 pounds.

Q. And he was in good health, you say?

A. In good health.

[fol. 135] The Court: She said perfect health, in fact—didn't you?

The Witness: Yes.

Q. And he had been working every day, had he?

A. Yes.

Q. For what concern did he work?

A. El Dorado.

Q. El Dorado Oil?

A. Oil Works.

Q. And how long had he been working for that company before it happened, this accident?

A. I think about two and a half or three years, I am not sure.

Q. And what position did he hold with that company at the time of his death?

A. Foreman.

Q. How long had he been foreman?

A. From the beginning.

Q. Now, you have produced withholding statements——

A. Yes.

Q. —issued by his employers during the years prior to his death?

A. That's right.

Q. And we have some withholding statements for the year 1952, and I ask you whether or not those were in your possession, these three withholding statements for 1952?

A. That's right.

Q. And does this withholding statement for 1952, show-

ing his employment for El Dorado Oil Works, show total wages for that year of $5,452.99?

A. That's right.

Q. And does his withholding statement for Nash, Inc., of 316 Barrow Street, Jersey City, show $764.96?

A. That's right.

Q. And his withholding statement for William H. Flinn, 775 Westside Avenue, Jersey City, show $50?

A. That's right.

[fol. 136] Mr. Baker: I offer them in evidence.

Mr. O'Neill: I just want to look at them to get the figures, if I may.

[Documents handed to counsel.]

The Clerk: They will be marked L-4.

[Received and marked Exhibit L-4.]

Mr. Baker: For the record, they show a total of $6,267.95 for the year 1952.

Q. I also show you withholding statement of Carl E. Skovgaard for the year 1951. And that shows his employment by El Dorado Oil Works, and during that year he had received $5,169.99?

A. That's right.

Q. Is that the only company he worked for that year?

A. At that time, yes.

Mr. Baker: I offer that in evidence.

Mr. Cunningham: No objection.

Mr. O'Neill: May I see it again?

[Document handed to counsel.]

The Clerk: That will be marked L-5.

[Received and marked Exhibit L-5.]

Q. I also show you a withholding statement for the same concern, El Dorado Oil Works, for 1950, showing total wages of $4,912.88.

A. That's right.

Mr. Baker: I offer this in evidence.

The Clerk: That will be marked L-6.

[Received and marked Exhibit L-6.]

The Court: In 1950 was he working for El Dorado?
Mr. Baker: Yes, sir.

[fol. 137] Q. During 1950 did he work for any other company?
A. Just El Dorado.

The Court: Just El Dorado?
The Witness: Just El Dorado.

Q. Now, Mrs. Skovgaard, during that period of time that we have just been discussing, of 1950, '51 and '52, could you tell us what your husband did with the wages which he received from El Dorado and the various sources that have been described here?
A. Well, he gave me all of it except $10 he kept for himself.
Q. And could you tell us approximately how much a week you would receive for the——
A. Sometime it would be a hundred——
Q. —for the support of yourself, children and home?
A. Sometimes a hundred, sometimes ninety, or sometimes even more.
Q. Are you talking about per week?
A. That's right.

The Court: Well, let me see now, so that it makes it simpler—was it his practice just to retain $10 a week out of his wages?
The Witness: That's right.
The Court: And he would give you the difference?
The Witness: Give me the difference.
The Court: How about when he required a new suit, or something, then what happened?
The Witness: Then he would get it.
The Court: From you?
The Witness: Yes.
The Court: In other words, you were the banker for the family?
[fol. 138] The Witness: Yes.

By Mr. Baker:

Q. And during this entire period of time you lived together with him and the family?

A. Yes, I did.

Q. And you were happy together?

A. Yes.

Q. Do you know whether he had any prior accidents or injuries?

A. No.

Q. He did not have?

A. No.

Q. Can you tell us what he did before he worked for the El Dorado Oil Works?

A. Well, he worked for Westinghouse. And just before he got the job for El Dorado he worked for Spiral Gyroscope in Long Island.

The Court: Sperry, wasn't it?

The Witness: That's right.

Q. What sort of work did he do for these companies?

A. Well, Westinghouse, I think he was in the machine shop.

Q. Was this job at El Dorado an advancement to the work he did before?

A. Yes, that's right.

Q. In a higher job?

A. Yes—I don't know. I don't know.

The Court: Well, did he make more money with El Dorado than he did with Sperry?

The Witness: Yes, he did.

Q. What is the condition of your health?

A. I am fine.

Q. Good health?

A. Yes.

Mr. Baker: At this time, your Honor, I offer in evidence the death certificate issued by the Bureau of Vital Statistics.

Mr. O'Neill: Your Honor, I am going to object to this [fol. 139] for the same reason as I did at the pre-trial hearing. There is no question in this case that Mr. Skov-

gaard is dead. We don't need a certificate to prove that. That is admitted.

Now, there are some things in here, put down by the doctor—there wasn't any autopsy performed, the doctor just looked and went on. As a matter of fact, I think the certificate is even signed by a doctor who wasn't there. I don't see the purpose of it or the relevancy of it. I don't know why it is being offered. The only thing it could possibly prove to your Honor, and the only statements we would be bound by, would be the fact that Mr. Skovgaard died the morning of December 6—I think it was. It serves no purpose.

The Court: Why do you want to put it in, Mr. Baker, any special reason? The respondents admit that he died on the morning of December 6, 1952, and that he died as a result of falling into this tank of hot oil, is that right?

Mr. O'Neill: That's right, sir; no question about that.

The Court: No doubt about it.

Mr. Baker: However, we do want to put it in also for the statement in the death certificate that there was suffocation and shock, as bearing on the question of the other actions we have pending for personal injuries, pain and suffering, up to the time of his death. And I think it is admissible in evidence.

The Court: Well, isn't it admissible under the Business Records Rule?

Mr. Baker: Yes. I have it under point 8 of the brief, your Honor, where I have got the case of Hunter against [fol. 140] Derby, Second Circuit, which says that a coroner's certificate was properly received in evidence.

The Court: Yes, I think it is admissible, Mr. O'Neill.

Mr. O'Neill: Well, I will say this—I will withdraw my objection and leave it up to your Honor to consider the probative value of it.

The Court: Yes, if you bring out that this doctor who signed it never even saw him, that would certainly affect the weight that I would give to any statement made by him. I am sure it is admissible. It may be marked.

The Clerk: The death certificate, L-7 in evidence.

[Received and marked Exhibit L-7.]

Mr. Baker: May I at this time bring to the attention of the Court—to take judicial notice of the new rule, 4:45 (A), Tables of Mortality and Life Expectancy, in which it states —this was adopted June 27, 1955, by the Supreme Court of the State of New Jersey—effective September 7, 1955, that the Tables of Mortality and Life Expectancy printed in the appendix to Part 4 of these Rules shall be admissible in evidence as prima facie proof of the facts therein contained.

And I specifically refer to the table of the age of this man, a white male, age 43, and that his life expectancy is 28.56.

Mr. O'Neill: I object, your Honor, on this ground. I think Mr. Baker said it wasn't adopted until 1955. Now, this accident didn't occur since June, 1955, and I submit, sir, that we are bound by the tables which were then in force.

The Court: Isn't that so, Mr. Baker?

Mr. Baker: I have no objection, but I haven't got the [fol. 141] other table.

The Court: You can get the other table.

Mr. Baker: Yes. I have no objection as long as we don't have to bring an actuary up here.

Mr. O'Neill: Oh, no.

The Court: No need for that, that I can see.

Mr. Baker: I have no objection.

The Court: All right. Bring in any standard table that was in force and effect at the time of his death. There are plenty of them.

By Mr. Baker:

Q. Now, Mrs. Skovgaard, will you tell us the circumstances when you last saw your husband alive, just what took place at that time?

A. Well, I was out that night, and my husband came and picked me up. And we got home and we were just sitting around—and it was Friday, and we were—thought we will have one of those Italian pies on Friday.

The Court: Pizza pie?

The Witness: Yes. We always had that on Friday.

A. [continuing] And so we decided that we were going to take a ride and get it. And we went over to Bayonne, and we got it. And we came home, and we sat down and had a cup of coffee, and the pie. And that is when Mr. Sexton called. He called my husband to come to work.

Q. What time was that about; do you remember the time?

A. I think that must have been after 11, half past 11, something like that. I don't just remember the time.

Q. And then he went to work?

A. Yes.

[fol. 142] The Court: Was he supposed to go to work that night, Mrs. Skovgaard?

The Witness: Yes, being that he was a foreman, and the pump broke, and they didn't know what to do with it.

The Court: They called him ahead of time.

The Witness: So they called him ahead of time so the men could go home.

Mr. O'Neill: Well, sir, I think what Mrs. Skovgaard mean there—if I may suggest it—is that he was subject to call, but he wasn't to go back that night.

The Court: That's what I thought. He was not to go back that night to work.

The Witness: No.

Mr. Baker: I think the proof will show that he is subject to call at any time.

The Court: I see. In any emergency he had to go out, is that right?

The Witness: That's right, yes.

Mr. Baker: No further questions.

Mr. O'Neill: I have no cross.

Mr. Cunningham: No examination by the respondent-impleaded.

The Court: That is all, Mrs. Skovgaard. Step down.

[Witness excused.]

Edward Donohue, called and sworn for the libellant, testified as follows:

The Clerk: May we have your name, sir?

The Witness: Edward Donohue, D-O-N-O-H-U-E.

[fol. 143] The Clerk: And your address?

The Witness: 11 Meadow Street, Bayonne.

Mr. O'Neill: Your Honor, at this time I would like to make a motion that all witnesses who will testify in the case from here on be excluded from the courtroom.

Mr. Baker: I don't see why. It is a public courtroom. People are entitled to listen to what is going on. There is nothing improper.

The Court: Well, he would have to show me a good reason why they have to be excluded, in a civil case, particularly. I have never had the request for a civil case.

Mr. O'Neill: I think they should be excluded for this reason. There have been a number of statements given in this case, as I understand it—I haven't seen them—and I am going to ask now for Mr. Cunningham to give me his statements, and I will ask Mr. Baker to give me the statements he has taken from these witnesses.

Now, we have, pursuant to your Honor's order, furnished statements of what our witnesses will testify to, and likewise the statements that were taken from these witnesses. And I think, under those circumstances, where there have been so many various versions, that it would be in justice for each individual to come in and tell his own story without knowing what went on before. I don't see how it could hurt the plaintiff's case. We have a rather involved question here, as your Honor appreciates, and I think—I have had a similar case, the case that Mr. Baker talks about, the Anderson case—we had in that case, I don't know how many witnesses, but there, too, it was the same fact involved, [fol. 144] many statements having been given, and the motion to exclude the witnesses in that case was granted.

Now, I am not asking that only his witnesses be excluded. I have witnesses presently in the courtroom and I ask that, likewise, they be excluded.

The Court: Well, I certainly am accustomed to conflicting testimony, in negligence cases particularly. We always get very, very sharp conflict in testimony. And if there are statements here—if these people vary from their statements, I am sure you are a capable cross examiner, you

will bring it out, to the attention of the Court, to affect their credibility very well. I don't like to exclude witnesses unless there is a real emergent reason, in the interest of justice, why they should be excluded.

Mr. O'Neill: All right.

The Court: The motion will be denied.

Mr. O'Neill: May I ask your Honor this, then, at this time, that I be furnished with the statements that were taken by Mr. Cunningham's office and Mr. Baker's office?

The Court: You don't have them?

Mr. O'Neill: I don't have them.

The Court: Is there any objection?

Mr. Cunningham: No objection from the respondent-impleaded, your Honor, except that I wish to say that the statements I have from Mr. Donohue were not taken by my office, but were taken by other people before we came into the case.

The Court: Do they purport to be the facts that he knows about?

Mr. Cunningham: They are statements by Mr. Donohue. [fol. 145] The Court: All right. Did you get his statements, Mr. Baker?

Mr. Baker: No, we haven't.

The Court: From anybody?

Mr. Baker: No, we only have certain copies of statements that other people have taken. But we have no statements.

Mr. Cunningham: The copies I have are unsigned statements. If your Honor wishes, I will give them to Mr. O'Neill now.

The Court: Yes, give them to him.

[Document handed to counsel.]

The Court: If you have anything, Mr. Baker, you give them to him, too. If you want any of his, he will give them to you. If we are going to have full disclosure, we will have full disclosure.

Mr. Baker: We got them before the trial, not at the trial.

Mr. O'Neill: Your Honor ordered it and we gave them over. If he has any, I think we are entitled to them now.

You have taken no statements of any of the witnesses?

Mr. Baker: No.

Before I interrogate this witness, I am going to call upon the defense counsel for the vessel to produce the log book, which I will offer in evidence.

Mr. O'Neill: Well, I think you have a copy of the log.

The Court: I believe you do.

Mr. O'Neill: I think we gave that, sir, at the pre-trial hearing.

[fol. 146] Mr. Baker: I offer in evidence this transcript—translated in English—the extract from the log book concerning the death of Carl Skovgaard.

Mr. Watson: Your Honor, this came up at the pre-trial hearing, and it also came up at the time the captain's deposition was taken by Mr. Baker, and at that time we submitted to Mr. Baker photostatic copies of the original deck log book and photostatic copy of the original engineering log book, which are written in Norwegian, and, as I understand—at that time I gave to Mr. Baker an unvouched for extract translation into English of the deck log book, at the same time making it very clear to both Mr. Baker and Mr. Cunningham that we did not know the source of the translation, and it was not complete. And that was mentioned at the pre-trial.

On the examination of the captain the photostats were marked for identification, the Norwegian photostats, and when we came before your Honor on pre-trial it was agreed that this extract translation, which Mr. Baker is now offering in evidence, was not a complete copy and that counsel for each side, armed with the original Norwegian, were to have the full translation into English.

The Court: That is what my memo of the pre-trial conference indicates. Did you have a translation?

Mr. Baker: Your Honor, we have not. We are willing to accept, as far as we are concerned, their translation, which they gave.

Now, I would say this—I don't want to be unfair, your Honor knows that——

[fol. 147] The Court: Yes, sir.

Mr. Baker: I am offering at this time the log book, plus this translation. I don't mean to foreclose them. If

there is any different translation, I have no objection for them to present those translations to the Court.

If there is any question going to be raised—and as far as I can see, I don't think there is—but if there is any question, then we will have to have it translated and bring it to your Honor. But, as far as I am concerned, I don't think there will be any question for your Honor.

I will offer this translation and the log book entry, subject to any proof which they submit that the translation should be altered. I have no objection to them presenting theirs, another one, a revised one.

The Court: But weren't you informed by your adversary at that time, at the pre-trial conference, that they couldn't vouch for the correctness of the translation?

Mr. Watson: Not only that we cannot vouch for the correctness, but that is not complete. It is not complete. That is what is known as an extract.

The Court: A summary?

Mr. Watson: A summary.

The Court: Oh, no.

Mr. Watson: That is why I made it clear at the examination of the captain that that was not complete, unvouched for, and was given to Mr. Baker merely for his convenience, as a kind gesture at that time, since we had nothing but the Norwegian.

[fol. 148] The Court: That's right. The rule is very clear that whenever an instrument is presented—a foreign document in a foreign language—it must be an accurate translation of the instrument, by a competent person.

Mr. Baker: There is a translation made, your Honor, by Mr. Cunningham, which he submitted to me.

Mr. Cunningham: I am not a Norwegian. I had it made.

Mr. Baker: As far as we are concerned, we will take any of these translations.

The Court: I know, but if they don't vouch for their accuracy, how can I let them in?

Mr. Watson: We have had a translation made, as your Honor suggested, after the pre-trial. We submitted the Norwegian logs to an ex-Norwegian ship captain, who is now a marine surveyor, Captain Lynner, and that is the

translation which we intend using. We believe that Captain Lynner is as qualified to translate a ship's log as anybody we knew, more qualified, we felt, than a legal translation service, since this is a marine matter and there is a great deal of technical language in the log book.

The Court: Yes.

Mr. Baker: Can we then have them present to us their —and I thought that was going to be the procedure, your Honor—they were going to present to us their various translations, and then we were going to check it to see if we agree on it.

The Court: No. I read the pre-trial memo. That is not what was agreed upon. You were supposed to have it [fol. 149] translated. And they were going to have it translated, too.

Mr. Watson: That's right.

Mr. Baker: Well, would they show that to us? It doesn't have to be done right away, any time during the day. And perhaps we will accept their translation and there will be no contest at all.

The Court: Well, you are not an authority on Norwegian.

Mr. Baker: Well, if your Honor please, if that is what they say——

The Court: You are willing to take their word as gentlemen?

Mr. Baker: I am willing to take their word.

The Court: Very good.

Mr. Baker: Especially if it is very similar to the facts which we have here.

The Court: All right.

Mr. Baker: So that we will take their word without contesting it, after we examine it.

The Court: All right.

Mr. Baker: It doesn't have to be done immediately. We can hold that proof till a little later.

The Court: Yes, sir. At the right time.

Mr. Cunningham: The translation that was made by the respondent-impleaded was made by the Lawyers and Merchants Translation Bureau, and they have no connection with any party to the action. If both parties feel that that

is a correct translation, I will be glad to offer both the [fol. 150] Norwegian log and their translation, if it is important at this time that it be put in evidence.

The Court: Can you hold that until I take a recess and then you can look them over?

Mr. Baker: Sure.

The Court: Do you need the log before you start with Mr. Donohue?

Mr. Baker: No, I just wanted your Honor to get the benefit of the log before the witnesses started testifying.

The Court: All right.

Direct examination.

By Mr. Baker:

Q. Mr. Donohue, where do you reside at the present time?

A. 11 Meadow Street in Bayonne.

Q. And whom are you employed by at the present time?

A. Foremost Food & Chemical Company, El Dorado Division, Bayonne.

Mr. Cunningham: Just a moment. The respondent-impleaded in this action, El Dorado Oil Works, is now the Foremost Food & Chemical Company. And I believe that we should make that change on the record. The Foremost Food & Chemical Company is the successor to El Dorado.

And what is the full title of your employer now, Mr. Donohue?

The Witness: Foremost Food & Chemical Company, El Dorado Division.

Mr. Cunningham: Thank you, sir.

The Court: Is the "Company" abbreviated or spelled out, do you know; is it "Co"?

[fol. 151] The Witness: Spelled all the way out, Foremost Food & Chemical Company.

The Court: This is the El Dorado Division that you work for?

The Witness: El Dorado Division.

Mr. Baker: In view of the fact that we didn't bring in

El Dorado, but the respondent did, do they want to make a formal amendment on the record?

Mr. O'Neill: I thought that Mr. Cunningham explained that, that the title would be changed.

The Court: Yes, the title will now be Foremost Food & Chemical Company in place of El Dorado Oil Works, or whatever it was.

The Witness: El Dorado Oil Works.

By Mr. Baker:

Q. How long had you been working for El Dorado Oil Works?

A. From February 8, 1950, till the present time.

Q. And were you working for them on December 6, 1952?

A. I was.

Q. The date of this occurrence.

A. I was.

Q. And what was your position with them at that time?

A. Assistant maintenance foreman.

Q. And who was your foreman at that time?

A. The deceased, Carl Skovgaard.

Q. And what were your duties as assistant maintenance foreman at that time, in general.

A. To take over for the deceased when it became necessary, fill in for him at times, do his work.

Q. And, in general, what was that work; can you tell us that?

[fol. 152] A. Supervising maintenance work.

Q. And the maintenance work is what work for the El Dorado Oil Works?

A. Checking over equipment, pumps, all the mechanical equipment in the plant.

The Court: See that the equipment is kept in good operating condition?

The Witness: Good operating condition, that's right.

Q. Now, on December 6 of 1952 could you tell us about what time it was that you went aboard the vessel, "MV" Tungus?

A. It was about 11 o'clock, or a little after 11.

Q. That was at night?

A. That's right.

Q. And where were you just before you went aboard the vessel?

A. I don't remember whether I was up in the mill building or on the pier itself.

Q. And had you been on that vessel before that particular time?

A. I believe I was. I can't recall being aboard before that.

Q. And what was the occasion that took place that brought you aboard the vessel?

A. I was notified that they had a break on one of the oil lines leading off the ship and went aboard to see what it was.

Q. And who notified you?

A. I believe it was Sal Russo.

Q. And what work did he do?

A. He was standby man on the pump.

Q. And he was employed by El Dorado Oil Works?

A. El Dorado Oil.

Q. And he was working under you?

A. No, I believe he was working under Mr. Sexton.

[fol. 153] Q. And tell us what Sexton's job was.

A. Pier superintendent at the time.

Q. And he was employed also by El Dorado?

A. By El Dorado Oil Works.

Q. And now could you tell us what you did next after you were notified concerning the break?

A. Well, when I get a—was called—I don't know, from the pier or the mill—I believe Sal notified me that he had a break aboard the ship on the oil line. I went aboard and looked down over the hatch, into the hold, I believe I went right down to the pump itself, and there was oil all over the place. I noticed the nipple had busted off the top of the "T". Well, I found out I couldn't do nothing with that "T", there was no way of fixing it, so Sal and I went off the ship again.

Q. Now, what time was it then that you were on the ship then, at that time, when you described just now?

A. It was between 11 o'clock and 12 o'clock. It may have been—I'd say 11:20 or so.

Q. That was before midnight?

A. That's right.

Q. And when you came aboard the vessel you then looked over the hatch, I think you said?

A. That's right.

Q. Now, would this photograph assist you in describing to this Court the——

Mr. O'Neill: If your Honor please, we have had that blown up. I think it would be better for your Honor. We have had this particular photograph blown up showing the scene.

The Court: Very good.

Mr. Donohue, when you say the oil was "all over"—all over what part of the ship?

The Witness: Well, our pump was on top of the hatch [fol. 154] covers and the oil was all over the top of the hatch covers, I'd say the immediate area around the pump, and the deck, and forward of the pump. I'd say it covered quite a bit of the hold, in that general area of the pumping.

Q. Now, Mr. O'Neill has been kind enough to give to us a large blown up photograph of the vessel in that vicinity, and it seems to be the same photograph which was marked as an Exhibit for identification—Exhibit 5 for identification on taking the deposition of the Captain.

Now, when you say that you came to the vessel and you looked down from the deck, could you tell and point out to the Judge just where it was that you were looking down from the deck?

A. I was looking down from here, this corner of the ship [indicating].

The Court: Indicating on the left side of the photograph.

Q. Which deck is that, is that the top deck?

A. I believe that's the main deck.

Q. And then you went down, you say?

A. That's right.

Q. Now, when you went down to—what deck do you call this deck, shown here, where the hatch cover is shown?

A. Well, to my knowledge, I believe it is the shelter deck.

Q. Is it also called the 'tween deck?

Mr. O'Neill: No, shelter deck.

A. Shelter deck.

Mr. O'Neill: We will explain that, if you want. On this particular type of ship this first deck down is open all the way through, and it is really the main deck of the ship. And this is the weather deck, which is above it with the housing.

By Mr. Baker:

[fol. 155] Q. Now, when you came down you said you saw the pump on hatch covers?

A. That's right. It was situated in this area, right here [indicating].

Q. Now, how were the hatch covers——

Mr. O'Neill: Why don't we mark it.

The Court: "Right here"—you better mark that.

Mr. Baker: Yes, we will mark that, for the pump.

Q. Where was the pump?

A. My best recollection of where it was—it could have been more on this cover, or it could have been setting on this cover, I don't remember.

Q. Could you put down there "pump"?

A. My best knowledge of it, I thought it was here, about this area [indicating].

Q. Would you put the word "pump" on it?

[Witness complies.]

Mr. O'Neill: Indicating that it is resting on both hatch covers.

The Witness: There is a possibility that it was, or it could have been on this cover. I don't recall.

Mr. Cunningham: Indicating the cover that is completely on.

The Witness: That's right.

Mr. Cunningham: The one on the lefthand side of the photograph.

The Witness: That's right, this one here [indicating].

By Mr. Baker:

Q. Was there one or two hatches there?

A. Well, the two hatches.

Q. And what type of hatches were they, for the purpose of——

[fol. 156] A. Well, it was to cover the top of these tanks.

Q. Now, what was the position of the hatch covers at the time when you went down on that occasion that you have described?

A. Well, the best I can remember, I thought this hatch cover was across this other tank top, over here further, not in this position that it is in now. I am not sure.

Q. Well, this hatch cover that you are referring to is the one that is on the right side.

The Court: The right hatch cover he thinks was on top of the left hatch cover, is that right?

The Witness: Partly.

Q. And how was that hatch cover, was it turned around in the position in which it was shown in this photograph?

A. I would say it was in this position here.

Q. In other words, when it is closed it is then——

A. Covers the whole tank top.

Q. Covered the whole tank?

A. That's right.

Q. And this was turned around so as to be horizontal across the right hatch?

A. That's right.

Q. Open. And what was the purpose of that?

A. To get our hoses down into the oil tank.

Q. Now, who was it that opened up this hatch cover and placed it in that position as you have just described it?

A. I believe the ship done that.

Q. Your men had nothing to do with that?

A. We had nothing to do with moving the hatch covers or removing them.

Q. So that it is the ship's crew that removed the hatch cover and placed it in the position—in an open position so [fol. 157] as to open up the hatch for the purpose of unloading the oil cargo, is that right?

A. That's right.

Q. Now, this pump that you have just described, to whom did that pump belong?

A. The pump belonged to El Dorado Oil Works.

Q. And who brought it aboard the vessel, from the dock onto the vessel?

A. The ship's crew lifted it aboard the ship.

Q. And who placed it on board the hatch covers as you have described?

A. The ship did.

Q. The ship's crew?

A. That's right.

Q. So that the ship's crew took this— A. Pump.

Q. —and by the aid of the winches—was that also operated by the ship's crew?

A. That's right.

Q. And they placed it in the position on these hatch covers, as you have described?

A. That's true.

Q. And then there were certain connections to be made for the purpose of unloading this oil. Who made these connections?

A. El Dorado employees.

Q. And do you know who of El Dorado made them?

A. I believe it was Mr. O'Leary was the one. Who the other gentleman was, I don't recall.

Q. And how were those connections made for the purpose of unloading this cargo; will you describe that to the Court?

A. Well, we have a 4-inch hose coming over—a rubber, flexible hose coming over this coaming on the main deck.

Q. Coming over the top deck, as you described before?

A. That's right.

Q. That leads where?

A. That leads down onto the deck here [indicating]. [fol. 158] We have a fitting on the pump here, and our 4-inch hose runs around, and goes right up over the top. It is a 4-inch hose, similar to this.

Q. And then is there another connection for the purpose of unloading this oil?

A. Another hose came off the fitting here on the pump and then went down into the tank.

Q. Into the tank?

A. That's right.

Q. And what was in that tank?

A. Cocoanut oil.

Q. And what was the purpose of placing the pump and the placing of the pipes there?

A. To unload the cocoanut oil.

Q. And where was it to be unloaded, to where?

A. To the storage tanks in the plant.

Q. In other words, it is unloaded right into the storage tanks on the dock of the plant?

A. No, up into the yard, up in the plant.

Q. It goes right to the plant?

A. That's right, runs through pipes.

Q. Now, when you arrived on this occasion, looking at this photograph, was there anything between—in the vicinity of these two hatches—besides what you just described?

A. What do you mean, if there was anything there?

The Court: Any other objects, you mean?

Mr. Baker: Yes.

The Court: So far we have the two hatch covers and the pump, right?

Mr. Baker: Right.

A. Well, we had these beams laying in between the two tanks.

Q. And in this photograph there are seen two beams? [fol. 159] A. That's right.

Q. Now, on the particular occasion that you have described, could you tell us how many beams were there at that time?

A. I believe there were two beams.

Q. And what are these beams, are they iron beams?

A. They are iron beams.

Q. And where do they belong, do you know? When I say "belong", where do they come from, what part of the vessel?

A. Well, I don't know myself whether they are from the main deck or down in the tank itself. In other words, they generally put—sometimes put cargo down in these

holds and they use these beams, or other beams, and put them across the tank down there.

Q. Did your men have anything to do with placing of the beams between these two hatches?

A. No, no.

Q. How much space is there, walking space, between these two hatches?

A. I'd say about three foot, maybe less, more.

Q. That's between these two hatches that you have described?

A. That's right.

Q. And on this particular occasion that you are talking about, which you indicated was approximately 11:20 or thereabouts, before midnight, could you tell us how high these beams were, with respect to the hatch coamings?

A. Well, I believe this hatch coaming is about a good three feet off the deck.

Q. In other words, these hatches, and with the coaming here, extended about three foot above the deck?

A. That's right.

Q. And how high would you say these beams were with reference to these hatches, were they higher than these hatches or were they lower than the hatches?

[fol. 160] A. Well, I'd say the beams were lower than the hatches.

Q. About how much lower?

A. From what I can recall from it, I thought that these beams in here were higher than they show in the picture.

Mr. O'Neill: I object. That is not responsive.

The Court: No, he said he "thought".

Q. How high would you say they were, from your present recollection?

A. From my recollection, they were about 10 inches off the top of the tank cover.

Q. In other words, you mean the tank cover is the cover on top of this opening, right?

A. Right.

Q. And you say they were 10 inches—what did you say?

A. About 10 inches. Now, I don't know——

Q. Ten inches above the floor or——

A. Below the tank cover.
Q. Ten inches below the tank cover?
A. That's right.

Mr. O'Neill: You said the tank cover was three feet high and these were 10 inches below?
The Witness: Yes.

Q. Now, how long or far did these hatch beams extend, how much of that space did it occupy?
A. It took up most of the walkway in there.
Q. Did it go right across, practically?
A. It went the whole length of the tanks, I believe.
Q. And what is that space usually used for, from your observation, in walking and working on vessels?
A. I'd say it is a walkway between the tanks, or around the tanks.
Q. And did your men have anything to do with the plac-
[fol. 161] ing of of (sic) these beams?
A. No, sir.

The Court: He already said the ship's men put them there. Is that right?
The Witness: That's right.
The Court: Don't repeat.
Mr. Baker: We shall take a five-minute recess. You may step down, Mr. Donohue.

[Short recess]

Q. Could you describe the pump; in other words, how long and how wide it was, just a general description of the pump?

The Court: Hold it. Don't we have a photograph of the pump involved in this operation? Does anybody have a photograph of it?
Mr. O'Neill: Not of this particular pump.
Mr. Cunningham: I have a photograph taken from a magazine.
The Court: Or anything like it, so that we have some idea of what this type of pump involved?
Mr. O'Neill: We have here some catalogues put out by the company that made the pumps. Maybe this witness can pick out——

The Court: Yes, the one that he says looks like the one that was in operation at that time.

[Shown to witness]

The Witness: Similar to that. We made our own skid for it. It was mounted on a steel skid. I would say it is similar to this pump here.

The Court: All right.

[fol. 162] Mr. Baker: Mr. Cunningham presented a pump which has been identified as similar. I would like to offer it in evidence, not as being the same pump, only for the purpose of illustrating to the Court what the pump was.

The Court: Yes, sir.

Mr. O'Neill: It will help the witness clarify his testimony.

The Court: That's right.

The Clerk: It will be marked L-8.

[Received and marked Exhibit L-8.]

By Mr. Baker:

Q. Now, what was the deck composed of, the deck itself, which you have shown, was it made of wood, metal——

A. No, a steel deck.

Q. And is that also a steel deck which is between the two hatches, which you have shown on this photograph?

A. That's right.

Q. That is all composed of steel?

A. Yes, sir.

Q. Is there also a walkway between these hatches—is that a bulkhead here in this photograph?

Mr. O'Neill: That doesn't mean much when you say, "Is that a bulkhead here?" Perhaps we should mark that "fore" and "aft".

Mr. Baker: Which is fore here?

Mr. O'Neill: This is aft and this is the fore part [indicating].

[Photograph marked.]

Mr. Baker: I offer in evidence the photograph.

[fol. 163] The Clerk: The photograph in question will be marked L-9.

[Received and marked Exhibit L-9.]

By Mr. Baker:

Q. Referring to this photograph marked L-9, and looking aft of the vessel, as has been described on this photograph, was there any passageway between the aft part of these two hatches and the——

A. Aft bulkhead?

Q. —and the aft bulkhead?

A. Well, I am not——

Q. Meaning this location here [indicating].

A. If it is designed to be a walkway through there, then that is what it is.

Q. How much space was there?

A. The ship could answer that, I believe.

Mr. O'Neill: I object.

The Court: The man is guessing. He really doesn't know; do you, Mr. Donohue?

The Witness: I don't know whether there is a walkway or not.

Q. How much space is there between that space?

A. I don't know.

The Court: That's right. Don't guess at anything. You get in trouble when they cross examine you.

Q. Now, when you came down on this occasion, which you said was about 11:20——

The Court: Don't repeat all the time. We all remember when he came down.

Q. [continuing] —and you stated something about oil being in the vicinity, would you describe just—on this [fol. 164] photograph—just where the oil was in that vicinity?

A. Well, I would say it took in this whole area in here [indicating].

Q. The whole area?

A. That's right.

The Court: Indicating the area covered by the two hatches.

The Witness: Hatch covers. The oil ran down off the covers onto this deck.

Q. Would you take this——

The Court: Don't mark it all up. The word description is enough.

A. It covered the whole general working area where we were working, here [indicating], all the beams—the beams laid here, they were full of oil, the hatch covers were full, this cover was full.

Q. When you say "this cover", you are referring to the port cover?

A. The port cover and the starboard cover.

Q. And when you say the hatch beams, you are referring to the hatch beams which were between the two hatch covers?

A. That's right.

Q. And the hatches?

A. That's right.

The Court: Also on the floor.

The Witness: All on this floor here [indicating], because——

The Court: Indicating in front of the two hatch covers?

The Witness: In front of the two hatch covers.

Q. In the forward part.

A. Forward.

Q. Now, what did you do after that then?

Mr. O'Neill: After what?

Mr. Baker: Withdraw that.

[fol. 165] Q. Where did this oil come from that you just described?

A. It came from the break on the fitting.

Q. And where was that break, on what fitting?

A. It was mounted to the side of the pump here on the hose line.

Q. Now, would you just put a little "x" there with that red pencil as to the fitting where the break was you just described?

A. I believe there was a "T" on the line here [indicating]. I believe there was a valve here [indicating], on top of this blank, which is a "T", actually a "T". It has a blank flange on top of it to cover off that hole. In that blank flange there was a hole drilled and a three-quarter nipple screwed into this hole. That's where the break occurred.

Q. Will you mark that with an "x"?

A. [Witness complies.] The nipple busted off the top of the flange.

Q. This nipple, and this place you referred to, is that in the hose which is the one that goes off the vessel?

A. That's right, goes off the ship.

Q. And it leads from the pump leading off the ship?

A. Off the ship.

Q. Now, after you came to this vessel, and you saw this break, as you described, I think you then said you went off the vessel?

A. I seen I couldn't do anything with it, because the threads were busted off right at the edge of the flange, so we went ashore to see if we could pick up another "T".

Q. When you say "we", who went ashore?

A. Sal Russo and myself.

Q. At the time when you were looking this situation over, as you described it, with reference to the pump and the [fol. 166] conditions you described, was there any officer of the vessel around at the time?

A. There were officers around.

Q. And where were they at that time?

A. I believe they were down here on the hatch cover, or forward of this cover here [indicating].

Mr. O'Neill: I am going to object to that answer as not responsive—he believes something. Either he knows or doesn't.

The Witness: The officers were there. Let's put it that way.

The Court: You know, Mr. O'Neill, a lot of witnesses say they believe something when they are stating facts—I believe, I believe. But you are right, technically. It is not what he believes that counts, it is what he knows.

Mr. O'Neill: That's right.

By Mr. Baker:

Q. And where were the officers?

A. I can't pick out the exact position where they were.

Q. In what vicinity?

A. They were in the vicinity of the pump.

Q. And were they on the same deck as where the pump was located?

A. That's true.

Q. And then you went ashore to get something else?

A. Get a fitting.

Q. And with whom did you go ashore?

A. Sal Russo.

The Court: Why do you make him repeat it?

Q. What did you do then?

A. We went up into the mill to pick up this fitting, and found one, came back aboard the ship.

[fol. 167] Q. And did you both return aboard the ship?

A. That's right, both of us returned.

Q. And what time was it that you returned to the ship?

A. I don't recall the exact time.

Q. The approximate time.

A. It was between, say, 11 and 12 o'clock.

Q. Then what did you do when you returned to the ship?

A. Well, we get up on top of this hatch cover here [indicating], near the pump, and disconnected the hose line from the fittings, inserted the new fitting in the line. And we were all slopping in the oil on top of the tank. I believe we got a squeegee—what we call a squeegee, and pushed some of that oil off the hatch cover so we could stand and work there. We didn't clean it off completely, but enough so not to kneel in it. And we installed this fitting back in the line.

Q. And while you worked there then, were the ship's officers there?

A. Yes, sir.

Q. Was there one or more than one?

A. I don't recall.

Q. And then what happened, what did you do?

A. Well, then we proceeded to get the pump back on the line again, or get it sucking up the oil out of the tank. I

believe we tried that for quite a while, tried to pick up a suction, but had no luck with it at all.

Q. Then what did you do?

A. Due to the great depth of the oil that it had to lift, it caused excess vibration to the pump. The pump was mounted on the steel deck, it was laying in oil, and it wasn't sturdy—or steady to the deck. It vibrated all over the deck. The vibration of the deck caused the bearings on the pump to overheat, being it couldn't pick up that oil from that depth, neither, that caused the bearings to run hot. Fooled around with it quite a while, trying to get a suction [fol. 168] back on it, but made no luck with it at all.

At that time the bearings were so bad that they actually went afire. So I decided then that we couldn't pick up the suction, I decided to go up and call—I believe Mr. Sexton, too, mentioned it, that maybe we should give Carl a call, the deceased.

Q. You are referring to Carl Skovgaard?

A. That's right.

Q. And did you then call him?

A. We fooled around a little while longer, and then decided we better do something about it. We didn't have another pump available, that I knew of, the same size. I did go to the phone, up in the plant, and I gave Carl a call.

Q. What time was it, approximately, that you called Carl Skovgaard?

A. I'd say it may have been after 12, maybe a quarter after 12, or so.

Q. That's after midnight?

A. After midnight.

Q. And did you leave the other men at the pump?

A. Everybody was aboard there—Sal Russo was there, Pat Sexton was aboard—I don't know if there were any other people from El Dorado there or not.

Q. Anybody from the vessel, the officers or crew of the vessel?

A. The officers were there.

Q. The officers were there?

A. That's right.

Q. And what was the next thing you did after that?

A. Well, I told the deceased about the condition of the

pump, and the trouble we were having. And he says, "Well, you have been down there long enough," he says, "you have been there since 5 o'clock." It was midnight already. He says, "I will come down and see what I can do, or maybe relieve you."

[fol. 169] So I went back to the ship again, I reported back to Pat, who was in charge of the——

Q. Pat, who is that?

A. Pat Sexton, who was in charge of the unloading of the oil, and told him that Carl would be down, the deceased.

We fooled around with the pump again, trying to get suction, but had no luck. Between 12 o'clock and one o'clock —in that period of time—the deceased came aboard the ship.

Q. This flow of oil from the break, had that stopped?

A. From the break?

Q. Yes.

A. Oh, yes. That was taken care of as soon as we put in the new fitting.

Q. And that was about what time?

A. Well, I believe the new fitting was put in there about—between 11 and 12 o'clock. I don't know the exact time.

Q. Before midnight?

A. Before midnight.

Q. So the flow of oil from the break had stopped before midnight, according to your recollection?

A. That's right.

Q. Now, were you present when Carl Skovgaard came aboard the vessel?

A. I was.

Q. And tell us what you observed with reference to Carl Skovgaard when he came aboard the vessel, what he did?

A. Well, the first time I happened to notice him, while we were working around the pump, was that he was up on the main deck, looking down from about here [indicating].

Q. And could you mark that with an "x" and could you put——

The Court: Put an "s" there so we know that is Skovgaard.

[fol. 170] [Witness complies.]

Q. That's from the main deck looking down in the hatch where you——

A. That's right. He was watching the procedure down there, what we were doing, maybe seeing whether we were doing it right, and so forth. He yelled down some orders to us, to try different things, but I don't remember what he said.

The next time I remember him, he was down on this side of the hatch, over here [indicating].

The Court: To the right of the port side hatch.

The Witness: That's right.

Q. Put a "c" there, for Carl.

A. "C".

Q. "CS" you put down.

A. Yes.

Q. And that was the next time you observed him?

A. That's right.

Mr. Cunningham: That position is now marked with "XCS".

The Court: That's right.

The Witness: That's right.

By Mr. Baker:

Q. Then tell us what you observed Carl Skovgaard did on that occasion?

A. Well, he yelled out orders from this point here [indicating] to us, to open the valve, try bleeding it, shut the valve off, or close the valve. What he said, I don't remember now, but it was in reference to trying to get a suction back. We were fooling there—I don't know how long—maybe 10, 15 minutes with it, and got nowhere with it at all. I believe he took it upon himself to come up and see what he could do with it himself.

Q. Describe what he did right after that.

[fol. 171] A. To my best recollection, he came along here [indicating], walked in through here [indicating].

Q. And that is aft of the port tank?

A. That's right. And stepped up on these beams here.

Q. Now you are referring to the hatch beams.

A. The two hatch beams in between the port and star-

board tank. I can remember he had the one foot up here [indicating] and he was making an attempt to get up on the hatch cover, to grab the pump, or get hold of the pump, to pull himself up on the tank top, or get to the pump.

At that time he slipped and fell backwards.

Q. And what did he slip on, from your observation?

A. From my observation, it was the oil.

Q. And where was that oil?

A. It was in this whole area here [indicating].

Q. And where did he slip from at the time when you observed him?

A. Between the hatch beam and the hatch cover.

Q. And what happened to him then?

A. He fell down into the oil.

Q. And where did he fall, into what?

A. He went down into this opening here [indicating].

Q. And that is the hatch opening of the port hatch—port tank.

A. That's right.

Q. And how much oil was in there?

A. I'd say about eight feet. I don't know offhand.

Q. Was that heated oil?

A. That was hot oil.

Q. And what happened next that you observed?

A. Well, Sal Russo and myself were around the pump. [fol. 172] Sal was closer to the ladder. I believe there is a ladder going down here, is that right?

Mr. O'Neill: You were there. I wasn't.

A. [continuing] Well, we climbed down a ladder into the tank. Sal went down first and he yelled up to get some light, and get a rope. In the meantime I went down, too. And the rest of the commotion on the deck, other people came down. Who they were, I don't know.

We got down there and it was pretty dark in the bottom. We couldn't see Carl at all. Sal was yelling up to get a light down, and I yelled up to get a rope—I don't remember what—get a basket. We climbed down onto the—sort of a walkway, I believe, in between the tanks, and we stood on that and tried to look for Carl. We couldn't see him at all. We couldn't see him at all. He was below the oil.

The next time I remember, they dropped a rope down to us. We took this rope and we tied it to the ladder coming down, across the top of the tank, or across the top of the oil.

Sal Russo grabbed hold of the rope and with his two hands hung onto the rope and with his feet was probing for the body in the oil. And a couple of attempts were made to get him out. We lost him again. And we finally did grab hold of him, and got him up on this walkway, or whatever you want to call it, down there, and laid him there and waited for the basket.

In the meantime they did drop a light down to us. And the next thing, they just took him off the ship. I went off the ship right after that and never went back on.

Q. Now, when you are talking about the lights, what was the lighting condition for this hold before Carl Skovgaard went aboard the vessel?

A. Well, to the best of my knowledge, there was one [fol. 173] light hanging here [indicating], more or less over the top of the pump.

Q. And you are referring to—will you put an "I" there? Oh, you put down "light". And you are referring to the top deck, the top deck on the starboard side?

A. That's right.

Q. In the starboard corner. And a cluster of lights, did you say?

A. That's right.

Q. Were there any other lights?

A. Not that I can recall.

Q. During the period of time that you were in that hold, as you described it, up to the time when Carl Skovgaard met his death, was that the only light provided there, from your recollection?

A. To my recollection, yes.

Q. And the hold where you were working, would you say whether it was light, or dark, or what it was?

A. I'd say it was dimly lit, or there wasn't too much light down there.

Q. And who furnished this light?

A. The ship furnished the light.

Q. Now, you have noted on this photograph, L-9, from the portion which you have marked "XCS", where he was first standing——

A. That's right.

Q. —you have a line leading aft and going starboard. Is that the line which is shown—the red line—as the progress of his walking?

A. That's right.

Q. Just immediately to the time of his death?

A. That's right.

Q. And then you have the line turning on to the hatch beams, which are between the two hatches?

A. That's right.

Q. And that is a description of the line of walk that he [fol. 174] had just immediately prior to his death?

A. That's right.

The Court: Was there sufficient light to work there, Mr. Donohue?

The Witness: Well, whether it was sufficient or not—I would say it was dimly lit. It wasn't the best conditions to work under. All those holds are dark when it gets—nighttime comes on it does get pretty dark down there.

Mr. Baker: Cross examination.

Cross examination.

By Mr. O'Neill:

Q. Mr. Donohue, what time did this ship arrive?

A. I believe it arrived around 5:30.

Q. It was dark when the ship arrived, wasn't it, on December 6?

A. Could have been. I don't remember.

Q. Well, December 6, at 5 o'clock, you don't know whether it was dark or not?

A. No, sir.

Q. Then you said that the crew took off the hatches. What you meant by that was that they took the hatches off the main deck, is that correct?

A. No, I didn't say that.

Q. Were you there?

A. I wasn't there when the ship was tied up.

Q. When did you first appear?

A. I was aboard the ship in the procedure when the pump, and so forth, went aboard.

Q. By the time the pump itself went aboard this hatch cover that you have told us about before had been placed in position, hadn't it? A. I believe so.

Q. Up to that point—the first thing you knew about this case was when you saw them taking this pump from ashore, is that right?

A. That's right.

[fol. 175] Q. And where were you when the pump came over the side?

A. I don't remember.

Q. What did you do on the ship when you first went down to get the pump up?

A. What time was that?

Q. You were there. You said it was 5 o'clock, I believe.

A. I am only going by what the records of El Dorado have, that the ship did arrive around 5:30.

Q. I want to know from you. You have given a lot of testimony, and what I want to know from you is, when you arrived. Let's forget about the ship.

A. When I arrived on the ship, I don't remember what time it was.

Q. What time do you have dinner hour there, or supper?

A. Down the plant? Supper.

Q. What time did you go to work that day?

A. Eight o'clock in the morning.

Q. And you go off for lunch, and then you have a break in the afternoon. What time do you go out to eat?

A. Twelve o'clock is lunch hour, 12 to 12:30.

Q. When do you eat again?

A. The next lunch hour is about 4:20.

Q. This was after lunch hour when you went down on the ship?

A. That's right.

Q. What was the purpose of you going down on the ship?

A. I was the assistant foreman at the time. Carl left me in charge, to see that—anything went mechanically wrong with the pump I was to take care of it.

Q. What did you do on the ship when you went down there?

A. Not a thing. I looked over the side and just watched [fol. 176] the men work down there, that's all.

Q. You looked over the side?

A. Yes, sir.

Q. That is, you just stood up——

A. On the main deck.

Q. On the main deck and looked down?

A. That's right.

Q. Now, who were the men working down there on this pump?

A. As far as I can remember, it was Jack O'Leary. Who the other people were—or men were—I don't remember.

Q. Was the pump in position when you got there?

A. I believe it was.

Q. Now, who directs the placing of that pump?

A. You mean setting the pump on the cover? I imagine —we have in the past, El Dorado employees.

Q. And how long did it take the El Dorado employees to have this pump set up, from the time you take it on the ship until she is ready to work?

A. Anywhere from a half hour to an hour.

Q. Mr. Donohue, you were in the office of El Dorado's attorneys, weren't you?

A. That's right.

Q. You gave them a story about what happened this night?

A. They asked me about it.

Q. Did you tell them that it took three or four hours for you people to set this pump up?

A. I did not, not that I can remember.

Q. How long did you watch the people work?

A. I don't recall.

Q. Well, were they finished and ready to pump when you left?

A. That's right.

Q. What time would that be?

[fol. 177] A. I don't remember what time it was.

Q. Let me ask you this: What did you do after you had supper around 4:30?

A. I didn't have any supper.

Q. After you had lunch, or whatever you call it, at 4:30, what did you do from that time until you went down on the ship?

A. Worked around the plant.

Q. And that consisted of what?

A. Checking on the maintenance work down there, watching the equipment.

Q. Were pumps going at that time in the plant?

A. I don't remember if the plant was operating or not.

Q. Well, the plant didn't have anything to do until this ship came in to give them some oil, did it?

A. Certainly it had things to do.

Q. What were you doing?

A. They were unloading soya beans on the pier.

Q. Did you have another ship in there?

A. No, we had bag material laying on the pier which they were putting into a conveyor.

Q. Were you taking care of the conveyor?

A. That's right. It was my job to take care of all the equipment at the plant, in the absence of Carl.

Q. You have no idea at all, although this is a very special night in your life, you have no idea at all what time you went down on this ship?

A. I do not. It's been a long time. It's almost three years now.

Q. Do you keep any records down at El Dorado of what work you are doing, for instance, whether you are working on a conveyor belt, or whether you are working on a ship? [fol. 178] A. We have sort of a work ticket.

Q. Do you make one of those out?

A. I don't make one out, no.

Q. Who makes it out?

A. Each one of the employees made one out.

Q. Did you make—each one of the employees?

A. Employees.

Q. Well, you are an employee.

A. That's right. I was a supervisor. I don't have to make out a work ticket.

Mr. O'Neill: Mr. Cunningham, I call upon you for those work tickets.

Q. When you came aboard ship how many El Dorado people were down there working on the pump?

A. I don't recall.

Q. Well, they are under your supervision, aren't they?

A. They were.

Q. The only one you have mentioned here is Russo.

A. Russo, Jack O'Leary, Pat Sexton.

Q. Well, Pat Sexton was over you, wasn't he?

A. No, he was a separate foreman.

Q. He wouldn't be down working on the pump?

A. He was more or less the supervisor of the unloading of the oil. It was his responsibility, oil.

Q. Who would be the men actually doing the work on the pump under you?

A. Jack O'Leary was the one who did hook it up.

Q. And you stood there while Jack O'Leary did it?

A. No, I did not.

Q. Was the pump set up when you left?

A. I don't remember whether it was set up or not.

[fol. 179] Q. Well, isn't it true that on this pump the bearing had been leaking from the time that you put it on the ship?

A. Mostly every pump in the plant the glands leak.

Q. And this leaked so bad that you put a bucket under it to catch the leak, or somebody under your supervision, is that correct?

A. We had a small bucket under it, yes.

Q. And you used this oil that leaked to cool off the bearings in the pump, didn't you?

A. No.

Q. You didn't cool the bearings at all?

A. We had regular grease.

Q. Oh, you put grease down there?

A. We put grease into the fittings.

Q. And who put grease into the fittings?

A. The men working down there.

Q. And on what side of the pump were the fittings? And looking at this photograph——

A. Here is the picture of the pump.

Q. No, I want to see it where you placed the pump.

A. Where I placed the pump?

Q. Yes. Where were the fittings you talked about that had to have the grease?

A. The pump is situated in here [indicating].

Q. That's the pump.

A. This is the electric motor. I am taking the whole stand, this whole business. This takes in the whole pump, the motor—the motor was here [indicating], the pump was on this end. You have a gland that comes out the back end of the pump here [indicating], and you have a gland on this end of the pump.

Q. And where did you have this bucket?

A. As far as I can remember, the bucket—we put it underneath this gland here [indicating], maybe one under this gland.

[fol. 180] Q. That's the gland there toward the starboard side?

A. No, it is fore and aft—port and starboard, yes.

Q. So the starboard side of the pump——

A. If the bucket was on the starboard side, I don't remember.

Q. Well, mark there where you put the bucket, put a "b".

A. I didn't put a bucket there.

Q. Where the bucket was.

A. I don't even remember where the bucket was. I am only going on what Sal Russo told me, that there was a bucket there.

Q. How much did Sal Russo tell you about this case?

A. He didn't tell me anything about it.

Q. Were you interviewed immediately after this case happened, and you said that this man fell from right in front of the pump?

A. I might have said it.

Q. And you also said at that time that you talked to Russo and he was closer, is that right?

A. I talked to Russo when?

Q. Right after you told somebody about how the accident happened.

A. Russo was right next to me—sure, he was—on the opposite side of the pump.

Q. Now, after you left these men working down below, you went ashore?

A. That's right.

Q. Do you have a work record as to what time you were called back aboard the ship, by Russo or anybody else?

A. No, there is no work record.

Mr. Cunningham: Mr. O'Neill, you called upon me for a work record of Mr. Donohue. I have a card here, which is a work ticket.

[Document handed to counsel.]

[fol. 181] Q. Why do you place the time that you went back aboard this ship was the broken—nipple, I think you called it—as around 11 o'clock, somewhere between 11 and 12?

A. Well, Arthur Sampson was aboard the ship. He was the standby man up until 11 o'clock. At that time he relieved Sal Russo, which was 11 o'clock. Right after that, that Sal Russo came aboard, he claims—well, he went off the ship to get some rags for the pump, or to clean his hands, or to clean up around the gland.

Q. Where were you?

A. I was on the pier, I believe, at the time when I seen Sal Russo.

Q. How far were you from the ship at the time that Russo relieved Sampson?

A. I don't remember how far.

Q. He didn't have to report to you, did he?

A. Sal? No.

Q. Sal went up, and he went aboard the ship, and he found a leak—I will strike that question.

Sal Russo went aboard the ship and the next time you saw him he had a lot of rags?

A. That's right. He was on his way——

Q. Was that because of the leak in this gland, as you call it, or was it because the nipple had gone?

A. No, it was the general practice, we always carried rags.

Q. No, you say he went on the dock for rags?

A. That's right.

Q. Was that because the nipple was leaking or because this flange that we talked about was leaking?

A. Because the glands were leaking.

Q. So as soon as Sal Russo came on the ship, and took [fol. 182] a look at the pump, and took up his place, he found that in spite of this bucket there was enough oil leaking to send him ashore to get rags, is that correct?

A. I don't know why he went ashore to get the rags.

Q. Do you have any record as to when this nipple really let go?

A. Not the exact time, no.

Q. You are not sure whether it was before or after 12?

A. Between 11 and 12 o'clock.

Q. You are sure of that?

A. I am not sure of it.

Q. It could have happened after 12 as well as before 12, couldn't it?

A. That the nipple busted?

Q. Yes.

A. I don't believe so.

Q. Why not?

A. Because at the time I called Carl it was about a quarter after 12, I believe. I am not sure of that time, either.

Q. Well, how long did you work on the ship before you called Carl?

A. Between 11 o'clock and 12 o'clock.

Q. You worked on the ship for that solid hour?

A. That's right.

Q. You were aboard the ship for that hour?

A. I was.

Q. What were you doing on there at 11 o'clock?

A. Eleven o'clock?

Q. Yes.

A. Well, the break happened somewhere after 11 o'clock. Whether I was on there at exactly 11 o'clock, I don't know. It could have been 10 after 11, it could have been a quarter after, it could have been 20 after 11.

Q. And was Russo with you or were you alone?

A. Russo was with me.

[fol. 183] Q. Well, this was after then Russo went ashore to get the rags, is that correct?

A. Russo went ashore around 11 o'clock. When he came aboard—he relieved Sampson at 11, he went off the ship

around 11 o'clock to get some rags. On his way back to the ship, I believe that is when he heard there is a busted fitting up there.

Q. That was the first time you had any knowledge of a busted fitting?

A. That's right.

Q. So that then, as I said before, if he went to get these rags, he went to get them because this gland that we have been hearing about had been leaking?

A. He may have wanted them for the glands, I don't know.

Q. Where was the oil running that leaked from this gland?

A. Dripping down, I guess, on the pump platform.

Q. Would it run on the hatch cover at all?

A. Not that much of it. It hasn't that bad a leak. You can always tighten up those glands.

Q. Did you tighten up the gland with a broken nipple?

A. No. Tighten up the gland with a broken nipple?

Q. When you broke it.

A. When I broke it? I didn't break the nipple.

Q. You were told about it?

A. That's right.

Q. When you went ashore—you didn't go aboard then until somebody told Sal that the nipple had gone, is that it?

A. That's right.

Q. Now, where would the oil from that nipple ordinarily spray, which part of the nipple—the nipple is over here, I believe, where you have——

A. Somewheres here [indicating].

[fol. 184] Q. Somewhere here. Now, that's in back of the pump, isn't it? We call that the forward part of the pump.

A. That's right.

Q. And which way would this nipple spill the oil, would it spill it back this way?

A. I don't know which direction the nipple was facing.

Q. Well, you went down and fixed the nipple, didn't you?

A. That's right.

Q. How big is the nipple?

A. Three-quarters of an inch, or an inch. I don't remember.

Q. And this was one of your steam lines, of course, that let go?

A. It wasn't a steam line, it was an air line.

Q. That belonged to El Dorado?

A. That's right.

Q. Now, this nipple broke and, of course, when it broke the oil would spray out because of the pressure?

A. If the "T" was facing up in the air, I'd say the oil went straight up and then came down.

Q. Well, would it go as far forward as you told us it did, up on that bulkhead?

A. That pump pushes 150 pounds an hour. I'd say so.

Q. Well, you had a small leak first, didn't you?

A. We had a gland leak.

Q. Then you had a slight leak in the nipple, isn't that correct?

A. I know nothing about that.

Q. When you got there it was spraying, wasn't it?

A. When I got there it was all stopped.

Q. It was stopped?

A. That's right.

Q. Well, then, you didn't see it?

[fol. 185] A. I didn't see the oil being sprayed; no, sir.

Q. Well, how long after this leak was taken care of did you arrive?

A. I got aboard—I guess it was about 20 after 11, or so, somewhere around that time. The pump was stopped.

Q. Well, it is your testimony that at 20 after 11, by 20 after 11 there had been a leak and the pump was stopped, is that correct?

A. That's right.

Q. Now, who stopped the pump, do you know?

A. I believe Sal Russo.

Q. Now, this machinery that we have been talking about is a peculiar kind of machinery, isn't it, used for pumping oil?

A. It is used for pumping oil.

Q. And you people who work on oil, it is more or less a specialty with you, isn't it?

A. We are in the cocoanut oil business, yes.

Q. And your company at that time was working under

a special contract to discharge this ship for somebody else, is that correct?

A. I believe that's——

Mr. Cunningham: I am going to object to that. I don't believe this witness knows what the contract was, between El Dorado and anybody else.

The Court: If he doesn't know, he just says, "I don't know."

By Mr. O'Neill:

Q. Now, did anybody tell you you had a very limited time to discharge that ship?

A. That wasn't any of my business.

Q. Well, now, were you in the office of El Dorado's attorneys and did you make this statement, "Because there [fol. 186] is only a certain time limit allowed for the vessel to be tied up at our pier for unloading before we have to start paying demurrage—" let me cross that off and I will read the whole thing.

Did you make this statement:

"The main reason the maintenance engineer supervises the placing of the pump is to see that the ship's crew do not damage it."

Did you make that statement in your attorney's office?

A. I may have.

Q. "While raising it to the deck and lowering it into the hold, also to see that no time is lost."

Do you remember making that statement in the attorney's office?

A. I don't remember it.

Q. And you continue, "Because there is only a certain time limit allowed for the vessel to be tied up at our pier for unloading before we have to start paying demurrage."

Do you remember that?

A. No, sir.

Q. But you do remember being in their office?

A. In whose office, Cunningham's?

Q. The attorneys for El Dorado.

A. What time was this, or what date?

Mr. O'Neill: There is no date on this.

Mr. Cunningham: That is dated February 6, 1953, the statement from which Mr. O'Neill was reading.

Mr. O'Neill: This statement was taken by somebody else. I received it from Mr. Cunningham and I assumed it happened in his office.

Q. This would be in the office of the Hartford Insurance Company then.

A. I never was up in the Hartford Insurance Company [fol. 187] office.

Q. Did anybody interview you down at——

A. There may have been somebody down at the plant. There were a number of people came down there.

Mr. O'Neill: I will ask the attorney for El Dorado if he can tell me where this statement was taken and by whom.

Mr. Cunningham: I don't know where it was taken. I know the date it was taken because of the date on it. I don't know exactly by whom it was taken, but it was given to me by a representative of the underwriter from California, who may be interested in this case.

Mr. Baker: Can the record show then who was the person who is claimed to have taken the statement?

Mr. Cunningham: I don't know that. As I said, it was given to me, and the only reason I know the date is because it is dated. I don't know where it was taken and I don't know by whom it was taken.

Mr. Baker: I object to any further interrogation on the statement unless they present—or are ready and prepared to present—to rebut this witness in the event that the witness denies any portion of the statement. They just can't interview him in a statement if they are not in a position to rebut him. They must be in a position, with the man who took it, to face and be ready to rebut any statement he may make which contradicts this statement, if there is such a contradiction. Otherwise I don't think they have a right to question from the statement.

Mr. O'Neill: I think the witness answered that question [fol. 188] just a moment ago. He said they probably took it at the plant.

The Witness: I said there is a possibility they did. There were a number of people down there.

The Court: I imagine there were, after an accident of this character.

The Witness: That's right.

The Court: Proceed.

By Mr. O'Neill:

Q. Did you tell those people, whoever interviewed you down there, "I did not make any examination of the beams or hatch plates because after we got Carl's body on the pier I never went back aboard"?

Mr. Baker: I object, for the reason I just stated, that he can't question him on the statement unless he is in a position to say, "Well, it was taken by soandso, and soandso." He just can't blindly ask him concerning questions which he is not——

The Court: Why argue about it? He can even guess at questions, and if the man says, "No, I didn't say it. I never said it to anybody," then he is stuck with it, if he can't rebut it.

Mr. Baker: He has to be in a position to rebut it.

The Court: He doesn't have to be in a position to rebut it. Don't lawyers ask questions without any foundation at all, and the witness says, "No, I didn't say it." Didn't you tell somebody once, somewhere, that the man fell on the ice?"

Mr. Baker: They shouldn't.

The Court: I wish they did do it. Trials would be much shorter if we had such a rule.

You see, if he can't rebut this by producing the man who [fol. 189] took the statement, he is stuck with this man's answers. Proceed.

By Mr. O'Neill:

Q. You told us that this hatch cover, or hatch coaming, was about three feet high?

A. I believe it was that high.

Q. And you told us that these beams that appear on

that photograph were about 10 inches below the top of the hatch cover?

A. They seemed to be that high.

Q. But you didn't examine them?

A. No, I didn't.

Q. Now, this pump we have been talking about, the power to operate that pump comes from shore, doesn't it?

A. That's right.

Q. And the lines that are used on the pump, to get the oil out, they come from shore?

A. That's true.

Q. The men to operate the pump come from shore?

A. That's right.

Q. About what was the capacity of this pump, as far as drawing was concerned?

A. Oh, I'd say it is rated for about a hundred ton an hour.

Q. Well, how high—in other words, you have your suction line down—you said something about the oil being very low. You had your suction line down in the oil?

A. That's right.

Q. Now, how much would this pump draw, how many feet?

A. Well, there is no pump that will draw any more than 29 feet. I'd say it was pulling from about 20 feet or so.

Q. And that would be capacity for this pump, wouldn't it?

A. I imagine so.

Q. Now, did you, or did Mr. Sexton, or anybody else in [fol. 190] charge of this pump, who knew its capacity, at any time attempt to lower it into the tank?

A. Lower the pump into the tank?

Q. The pump.

A. We never lower the pump into the tank unless we have to.

Q. Well, when a pump won't draw, isn't that time to lower it down?

A. It is the last procedure. It takes a lot of unrigging and rigging up again to get it down into the tank.

Q. You can put it on a pallet, and put it on a sling, and drop it, can't you?

A. It is already mounted on a sling—on a pallet itself, a skid.

Q. Well, then all you would have to do is put the slings on it and drop it down the opening that we are looking at there, make it fast to one ladder, and make it fast to the side of the tank, and let it work right there, right?

A. The length of the pump is quite large and the opening——

Q. I know the length of the pump. You have a picture of it. I am talking about doing a job.

A. Right.

Q. In order to do this job, when you reach the maximum point on a pump, you lower it into the hatch and get the oil out, don't you?

A. At times we could suck—continue pulling the oil right from the main deck there.

Q. This pump that you had wouldn't pull, would it?

A. Not after we lost the suction, no.

Q. And it never pulled after that, in that position, did it?

A. No, sir.

Q. Now, as a maintenance man, didn't you know, when you had that pump there, and went down and looked at it, that the depth of the oil—that you had reached the maximum of your equipment to handle it?

[fol. 191] A. The reason I called the deceased back was because of the bearings burning, not because of the height of the oil, or the depth of the oil.

Q. Now, just a minute. The bearing wouldn't have much to do with this pump drawing, would it; you had a hose up over the side.

A. That's right.

Q. And that hose was full of oil?

A. Not after the break.

Q. Well, the only part that could fall back into the tank would be the oil—let's describe the hose. This hose rested on a saddle?

A. No, it just laid over the side.

Q. Laid over the side. Well, when you got on this side of the coaming, the oil wouldn't throw back, would it?

A. This oil would flow back [indicating].

Q. Just from here to there [indicating].

A. That's right.

Q. Now, when you were priming——

The Court: From here?

Mr. O'Neill: From the top of the coaming down to the tank top.

The Court: All right.

Q. Now, when you were trying to get the suction on this pump, you were trying it at various speeds, I suppose?

A. No, there is only one speed on the pump.

Q. And all the time you were pushing air up against this header of oil you had in that discharge line, weren't you?

A. There is a bleeder on the line itself.

Q. Just answer the question, please. You were pushing the air up against this header of oil you had in the pipeline, weren't you?

[fol. 192] A. Possibly were.

Q. And is that the reason you mentioned that somebody suggested that you bleed the line?

A. I don't remember saying that.

Q. Well, you say you didn't say that in this testimony?

A. As far as I can remember. I don't know.

The Court: He said Mr. Skovgaard suggested bleeding the line for a while; didn't you say that?

The Witness: That's right.

Q. And bleeding the line means letting the air out, doesn't it?

A. That's right.

Q. And that was his direction to you?

A. That's right.

Q. Now, you said something about you were down there on the tank top, and you were sloshing around?

A. That's right.

Q. So you went down on this tank top and you had a squeegee, was that it?

A. That's right.

Q. And that squeegee is something like you use to clean a window?

A. That's true.

Q. And you used that and you pushed the oil off the top of the tank top, is that it?

A. Around my working area.

Q. Well, what would your working area be?

A. Close to the fittings on the tank top.

Q. Will you mark that with a "w"?

A. Now, if this pump was setting in this exact spot, I don't recall. It could have been over further, but we were standing on the tank top. As I said before, this cover could have been across here [indicating], the pump could have been setting here, or it could have been setting on this cover, I don't recall it.

[fol. 193] Q. What would you call your work area?

A. I'd say around the fitting of the pump. At that time what the work area was, I don't recall. But I recall there was oil there and I was getting it all over my pants and my shoes.

Q. And, of course, there was a lot of oil down in here.

A. That's right.

Mr. Cunningham: Where is that?

Mr. O'Neill: Right forward of the tanks, between this piece here that we see, of metal——

Q. That's the hatch, isn't it?

A. Hatch cover.

Q. And there was oil in here, it was all covered with oil in there?

A. That's right.

Q. Now, where did you push the oil that you pushed off the tank top?

A. I don't know if I completely pushed it off the cover or not, or I just pushed it. I don't remember where I pushed it.

Q. Well, did you push it in that space that I just pointed out to you, just aft of the tank covers there?

A. I don't remember that.

Mr. Cunningham: Just aft of the tank covers?

Mr. O'Neill: Just forward. I am sorry. I am thinking of a Liberty ship.

Mr. Cunningham: All right.

By Mr. O'Neill:

Q. You are not sure where you pushed it?

A. No, sir.

Q. Now, were you wearing boots?

A. No, sir.

Q. Did Russo have boots on?

A. I don't believe so.

Q. You don't know?

A. I don't know.

[fol. 194] Q. But when Mr. Skovgaard came down that ladder, which is on the starboard side—is that the ladder he came down?

A. I don't remember what ladder he came down.

Q. Well, you saw him standing up there; where was he standing?

A. He was standing here [indicating].

The Court: On the starboard side.

The Witness: The starboard side.

By Mr. O'Neill:

Q. And you say there was oil all in through here?

A. That's right.

Q. So when he came down that meant he had to walk through oil?

A. That's right.

Q. To get to the point where you saw him, over in that corner there, where you have an "XCS" mark, is that correct?

The Witness: Will you repeat that again?

[Record read.]

A. I don't recall how he came down, or how he got over to that point. I only remember seeing him at that point.

The Court: All right. We will recess for lunch. Be back at 2 o'clock.

[Noon recess.]

Afternoon Session

EDWARD DONOHUE, resumed the stand.

Mr. O'Neill: What was the last question?

[Record read.]

The Court: That's when he first saw him, on that level, where the hatches are, is that right, at that point?

The Witness: Between decks, that's right.

[fol. 195] The Court: How he got down there, you do not know.

The Witness: No, I was busy working.

Cross examination [continued].

By Mr. O'Neill:

Q. What was over here on the ship? I am now point (sic) to the port side of the ship, just alongside the tanks.

A. I have no recollection.

Q. Cargo, wasn't it?

A. It could be. I don't remember.

Q. You were going to salvage this oil after the operation was over, weren't you?

A. At times we did salvage oil.

Q. Is that what you were going to do here?

A. We may have. I don't remember now.

Q. You told us you intended to salvage the oil, didn't you, when you gave the statement?

A. I don't remember making that statement.

Q. Is that your signature?

[Document shown to witness.]

A. I guess it is.

The Court: You guess? Don't you know?

The Witness: Yes, it is my signature.

By Mr. O'Neill:

Q. In that statement didn't you say, "We intended to salvage the oil"?

A. If it is in there, I guess I said it.

Mr. O'Neill: That is all, sir.
The Court: Mr. Cunningham.
Mr. Cunningham: I have no questions, your Honor.
The Court: Any redirect, sir?
Mr. Baker: I have a few questions, your Honor.

Redirect examination.

By Mr. Baker:

[fol. 196] Q. I don't think I asked this question before. Could you tell us about what time it was that Skovgaard fell into the open tank?

A. About one o'clock.
Q. One o'clock?
A. One o'clock.
Q. One a.m.?
A. One a.m.
Q. And were there any guards, or any protections of any kind about the open part of that tank?

Mr. O'Neill: I object to that as not proper redirect.
The Court: Well, he said he forgot to ask a few questions on direct.

A. My recollection, there wasn't any.
Q. It was entirely open?
A. That's right.

Mr. Cunningham: Would you please repeat that?

[Record read.]

By Mr. Baker:

Q. Now, with reference to the pump which was on these tank covers, as you described them, in the manner in which it was connected, and fitted, and being used, was it being used in the usual and proper manner?

Mr. O'Neill: I object to that, sir. That is absolute conclusion.
The Court: Hold it a minute.

[Remarks off the record.]

The Court: What are the grounds of the objection?

Mr. O'Neill: Well, I object, first of all, it calls for the operation of the mind; and, secondly, he said he wasn't there, he didn't see the pump finally connected up; and, [fol. 197] thirdly, he said he wasn't there when this thing broke. So how can he tell us how it was being used, when he wasn't there?

The Court: Was it being operated the way it is usually operated under the circumstances?

The Witness: Yes, sir.

The Court: That's all he can tell you.

Mr. Baker: That is all.

The Court: I guess that is all, Mr. Donohue.

[Witness excused.]

Salvatore Russo, called and sworn for the libellant, testified as follows:

The Clerk: May we have your full name, please?

The Witness: Salvatore Russo, R-U-S-S-O.

The Clerk: And your address for the record?

The Witness: 2011 Baltimore Avenue, Ortley Beach, New Jersey.

The Court: You reside in Ortley Beach, Mr. Russo?

The Witness: I do, all year round, your Honor.

Direct examination.

By Mr. Baker:

Q. Mr. Russo, at the present time, can you tell us by whom you are employed?

A. I am employed by the Toms River Cincinnati Chemical Company, Toms River Division.

Q. You are no longer connected with the El Dorado Oil Company?

A. No, sir.

Mr. O'Neill: Your Honor, may I interrupt at this point? I would like to ask Mr. Cunningham to produce Mr. Russo's statement.

The Court: Do you have one, Mr. Cunningham?

[fol. 198] Mr. Cunningham: Yes, I do. Shall I produce it?

The Court: Yes, sir.

Mr. Cunningham: I have one statement dated July 25, 1955; on four sheets of yellow paper, which was taken in my office, the original of that statement; and I have copies —apparently copies of other statements, one of which is dated December 6, 1952—it is noted: "Death, December 6, 1952." I don't know whether that is the date of the statement or that is meant to be the date of the death.

And I also have a copy of another statement. In other words, I have an original and a copy of two statements.

The Court: How many did you make altogether, three?

Mr. Cunningham: I have the original, which was taken in my office, of one, on the yellow sheets of paper, which Mr. O'Neill is reading, and also the copies of statements taken by someone else that were given to me.

By Mr. Baker:

Q. Now, Mr. Russo, on December 6, 1952, which was the date of this occurrence, by whom were you employed?

A. By the El Dorado Oil Works.

Q. And what was your job with them on that date?

A. I was a maintenance mechanic's helper.

Q. And what were your duties, generally, in that job?

A. Well, to assist the mechanic in any repairs he may do.

Q. And who was your immediate boss?

A. Edward Donohue.

Q. Edward Donohue?

A. Yes.

Q. Now, how long had you been working for the El [fol. 199] Dorado Oil Works before that date?

A. I started employment there on the sixth of February, 1950.

Q. 1950?

A. 1950.

Q. And did you keep that job during that entire period of time?

A. As a maintenance helper?

Q. Yes.

A. No, I was an extraction plant operator before that.

Q. What?

A. Extraction plant operator.

Q. Now, on December 6, 1952, when was the—I think the date should be—I think it is the previous day, I think it is December 5 of 1952, that evening.

The Court: There is no doubt that the accident happened after midnight, is that right?

Mr. Baker: That's right. So that would make it the sixth. So the date I am thinking of now is the night before, which would be December 5 of 1952.

Q. On that date when was the first time that you went aboard the vessel, the Tungus?

A. Well, I relieved Sampson at about five minutes to eleven of that night.

Q. Five to eleven?

A. About five of. I always relieved him a little earlier.

Q. Was that your regular time to go aboard the vessel?

A. Eleven o'clock.

Q. Is that the hour you started?

A. I started at 11 o'clock, but I always go on a few minutes before.

Mr. O'Neill: Keep your voice up.

The Witness: All right.

Q. Tell us what you saw when you went aboard the vessel?

[fol. 200] A. Well, the pump was operating and pumping the oil out.

Q. And could you tell us then just where the pump was—referring to this Exhibit L-9—could you tell us, first, how the hatch covers were arranged? This is a photograph which was taken a long time after the accident, so that we will ask you to tell us from your observation at that time how these hatch covers were arranged, in this particular hold.

A. This hatch cover was laying partly on this side.

The Court: The port hatch cover——

The Witness: The port was laying partly on the starboard hatch cover. The pump was laying just about here [indicating].

Mr. O'Neill: Just a moment. We get again— "Right about here." May we have the red pencil, please?

Mr. Baker: Well, you will get it mixed up. Have you got a blue pencil, please?

Mr. O'Neill: No, we want the blue.

The Court: Now wait a minute.

Mr. O'Neill: Shall we get another photograph?

The Court: Maybe it's better, because otherwise we will have to tell him that is where Mr. Donohue puts it. Have you got another photograph?

Mr. O'Neill: We will order one.

Mr. Baker: Is it all right if he marks it with the blue?

Mr. O'Neill: Yes.

The Court: It won't take that blue.

Mr. O'Neill: Put the red on and then we can put a naught on it.

[fol. 201] Mr. Baker: Can we, without marking it—save the marking till tomorrow—in the meantime designate it for the record?

Mr. O'Neill: Will ink work?

The Witness: Just about in this area. Like this [indicating].

By Mr. Baker:

Q. You are putting it on the port hatch cover?

A. It was on the port hatch cover.

Q. The pump?

A. The pump.

Q. I see. Now, was the opening of the port hatch, was any part of it open, in the manner in which you have described it?

A. Yes, just the way it is now.

Q. Just as shown in this photograph?

A. Yes.

Q. About half of it was open?

A. I'd say about that much.

Q. And was it similar to this photograph, was the hatch

cover turned around at right angles similar—as shown in this photograph?

A. It was.

Q. So as to leave half the hatch open?

A. It was, but part of this was laying on top of this one, on the starboard one.

The Court: Wait. I think that Mr. Donohue said that, too.

Mr. Baker: Yes, but I am trying to have him denote what he knows about it.

Q. And how much open space was there after the hatch cover was opened up, the way it has been shown, and you have described it?

[fol. 202] A. I'd say about half the tank was open. I couldn't say exactly in feet.

Q. And do you know who it was that had taken the hatch cover off and arranged it as it was?

A. Well, I wasn't there at the time, but I believe it was the ship's crew.

The Court: He said do you know.

The Witness: Oh, no.

By Mr. Baker:

Q. Who usually does it, if you know?

A. The ship's crew. They handle all the winches.

The Court: Well, if he knows who usually does it, then he can answer.

Q. And do you know who brought and placed this pump on these hatch covers?

A. Who done the lifting was the ship.

Mr. O'Neill: Again, sir——

Mr. Baker: That's usually done.

Mr. O'Neill: —he wasn't there, because he said he came on at 11 o'clock.

The Court: Don't testify to anything you don't know of your own knowledge.

The Witness: All right, sir.

The Court: Or anything you didn't see with your own eyes.

By Mr. Baker:

Q. Did you see who brought the——

A. No, I didn't see it.

Q. —who brought this pump on to the hatch covers?

A. No.

[fol. 203] Q. And who usually brings the pump, under the same circumstances, and brings it from the shore onto the hatch covers?

A. It is the ship.

Q. The ship's crew?

A. Ship's crew.

Q. And who connects the fittings and the hoses, who does that, usually?

A. That's the El Dorado crew.

Q. Your El Dorado crew. Did you do any of the connections on this particular occasion?

A. No, sir.

Q. So that it was already connected when you came aboard?

A. The pump was operating when I went aboard.

Q. And when the pump was operating what was it doing at that time—when you say "operating", what was it doing, particularly, what was the purpose of the pump being there?

A. To discharge the oil from that tank.

Q. And it was discharging the oil which was cargoed in the tank?

A. That's right.

Q. The tank which is shown in this photograph?

A. That's right.

Q. And where was it discharging it?

A. Onto a tank—into a big storage tank on the shore.

Q. And how was that gotten from the vessel into the storage tank on the shore?

A. Well, there is a line which drops into the oil. That's the suction line. Then there is a discharge line that goes up, goes over the deck, and it is connected to a pipe, a line overhead on the pier.

Q. And then through the pipes it goes on to the storage tanks?

A. It is pumped into the tank.

Q. And the entire operation, and the use of the pump. [fol. 204] was to discharge the oil onto the land, the cargo tanks on the land?

A. Yes, sir.

Q. And your job was to what?

A. To man the pump, make sure it was operating.

Q. And see that it was operating?

A. See that it was operating.

Q. And you worked under the jurisdiction of whom?

A. That night, Mr. Sexton.

Q. And what was his job there?

A. Well, he was in charge of getting that oil out.

Q. And he was employed by El Dorado?

A. El Dorado.

Q. Now, what job did Donohue have on this particular occasion?

A. He was the assistant maintenance foreman.

Q. And did he have anything to do with the maintenance itself—the manual work of the pump?

A. No, just the maintenance work of it.

Q. Was he the one who just gave the directions and you fellows did the work?

A. Well, as far as—no—yes, I guess he did. He did.

Q. Is that right?

A. Yes.

Q. In other words, if anything had to be done with the maintenance of the pump, you did the work?

A. That's right.

Q. But he directed it?

A. That's right.

Mr. O'Neill: Who is the "he"?

Q. By "he" you are referring to Mr. Donohue?

A. Mr. Donohue.

Q. Now, when you came aboard the vessel I think you said it was about five to eleven that night. What did you [fol. 205] observe with reference to the conditions going on at that time?

A. Well, the pump was operating.

Q. And then what did you do after that?

A. I went down, and I checked—after Mr. Sampson went, I went down and checked to make sure it was operating, and checked the amount of oil that was in the tank, and I just watched it.

Q. Now, was the pump at that time operating in its usual manner?

A. Yes, sir.

Q. And was it connected and fitted, and working in the manner that it usually operates?

A. It was.

Q. Now, did anything take place thereafter?

A. Yes. About 20 minutes after I got there I went out to the pier for some rags, because you always need it to wipe off a fitting, or something like that, and when I came back, when I got near the hatchway, one of the crew yelled that there was a break in the pump, a leak. So I immediately ran down there. When I seen, I climbed down the ladder, down this ladder here [indicating], ran across here [indicating]——

Q. When you say "this ladder"—that's the starboard ladder?

A. The starboard ladder.

[Continuing] —went down here, got to the switch and shut it off.

Q. You shut off the pump?

A. I shut off the pump.

Q. What time was that, approximately?

A. Maybe 25 after.

Q. After what?

A. After 11.

Q. And what did you observe at that time, when you shut off the pump, what did you observe there?

A. There was still a back pressure, it was still leaking. Not force, but it was just the back pressure, backing up. That was—it was really flowing. Then the ship's crew came down and they put a peg into it, to stop the leak.

[fol. 206] Q. The ship's crew did that?

A. The ship's crew.

Q. Where did they put the peg in?

A. Into the nipple that broke off.

Q. Where was the nipple that had broken off; could you show us on this photograph, L-9?

A. It must have been about here [indicating], as far as I can recollect. This is the platform of the pump.

The Court: Yes, sir.

A. [continuing] And there was a "T" here. Well, that's the way I——

The Court: The way you recall it.

A. [continuing] Say this is where the nipple was, well, that broke off.

Q. Put an "n" there.

Mr. O'Neill: Just a moment.

A. [continuing] That's where they put the plate, the peg, after this broke off.

Q. Was that part of the pipe which would lead off——

A. That was the discharge end of it.

Q. Is that right?

A. That was the discharge end.

Q. That is what broke off, you say?

A. That's right.

Q. Could you describe what it was that broke off, give a full description of it?

A. Well, it is a one-inch nipple tied into a "T". A one or three-quarters, I don't know which it was. It was tied into a "T" and that just snapped off, leaving it just open, and oil just shot out of it.

The Court: Did you see oil shooting out of it?

The Witness: Yes.

Q. And how was it shooting?

A. This way [indicating].

[fol. 207] Q. I mean, what direction?

A. Upward.

The Court: A 45 degree angle, is that it?

The Witness: I couldn't be sure. It was pointed in the air, though.

The Court: Was it coming toward the forward part of the ship?

The Witness: It was all over.

The Court: All over.

The Witness: It was here [indicating]. Then when they plugged it up, there was oil all over the place.

By Mr. Baker:

Q. And the ship's crew, you say, plugged it up?

A. They come down and they put a wooden peg into it.

Q. You saw that?

A. Yes. They put in a peg and they hit it with a sledge hammer.

Q. Could you tell us who was the ship's crew, was there one, or two, or three men?

A. There was more than two or three.

Q. Was any ship's officer around at that time?

A. Yes, there was.

Q. Was it one, or more than one—ship's officer around at that time?

A. Well, there was a big commotion going on.

Q. And that was about—the time was about 11:25, or thereabouts?

A. About 11:30.

Q. Now, when you turned off the pump, what did that do; when you turned off the pump, what effect did that have?

A. Well, that just slowed it down a bit. Then we get back pressure after that. She wasn't being pumped out, but there was back pressure.

[fol. 208] Q. After the crew, as you described it, had plugged up this leak, or this break, thereafter was there any more oil coming out from this pump, or any of these pump connections?

A. No.

Q. That was the last?

A. That was the last. This was plugged up, the pump was shut down. That was it.

Q. That was about 11:25.

A. 11:25, 11:30.

The Court: 11:25 or 11:30. He can't hold you to the minute.

Q. Now, when you say it was all over, this oil that came from the leak, could you describe just what vicinity this oil had been in, could you give us a description, for the record?

A. It was all in the forward part, the starboard——

Q. Now, when you say "starboard", the starboard what?

A. Right around here [indicating].

Q. You mean the starboard hatch cover?

A. The starboard hatch—tank top or hatch cover. The forward end. And this tank top.

Q. You are now referring to the port tank top?

A. The port tank top.

Q. You are referring to beams?

A. Beams.

Q. Between the two——

A. Between the two coamings.

The Court: You know, you don't make a bad witness yourself.

Mr. O'Neill: He is leading all the time.

The Court: Well, why don't you object?

Mr. O'Neill: I will.

Mr. Baker: Your Honor, he said that.

The Court: I know. You better let me describe what he [fol. 209] is pointing to. Some lawyers don't like it when you do it.

The Witness: I will repeat it, your Honor.

The Court: So far it is all right. Now, do you recall specifically, Mr. Russo—if you don't know, say you don't know—was there oil on those beams in between the hatch covers?

The Witness: Yes, there was, because there was oil all over the place.

Mr. O'Neill: Now, I object to that.

The Court: I only asked you about the beams. There was oil on the beams, is that right?

The Witness: Yes, sir.

The Court: Now, do you recall how tall those beams were?

The Witness: Well, I remember Skovgaard, when he come by, he didn't have much protection. I'd say about a foot from the tank opening.

The Court: About a foot below the tank opening.

The Witness: Below the tank top here, this coaming [indicating].

The Court: And were there two of them there?

The Witness: There was more than one.

The Court: You mean there might have been more than two?

The Witness: I'd say there was two.

The Court: You are sure there were two.

The Witness: There was two there.

The Court: Well, now we have got that settled, where the oil was, according to him, and what was there. Now, [fol. 210] the next question.

By Mr. Baker:

Q. Now, these beams that you have described, between the two hatches, do you know what type of beams they are, and where they came from, if you know?

Mr. O'Neill: You can answer that yes or no.

The Court: Do you know, first.

A. No, I don't know where they came from.

Q. Do you know who placed those beams there?

A. No, sir.

Q. Did you, or any of your men, in your presence, place any of those beams?

Mr. O'Neill: I object to what other men may have done, sir.

The Court: Did you see who placed them there?

The Witness: No, sir.

The Court: That ends that. He didn't see who placed them there.

And they were there when you came on board, is that right?

The Witness: They were there. Everything was operating when I came on board.

By Mr. Baker:

Q. Now, how much space is there between these two hatches where these beams were?

A. I'd say about this [indicating]—

Q. Can you say in feet?

A. About two, two and a half.

Q. And what is that place used for, ordinarily, from your experience?

[fol. 211] Mr. O'Neill: Now, I object, what it may be used for ordinarily. How would this man know, he wasn't on the ship. How would he know what it was used for?

The Witness: To the best of my knowledge, that's—

The Court: Let's not have a hassle over that. Obviously it is a place that people walk between the hatches, if they have to.

The Witness: It's a passageway.

By Mr. Baker:

Q. Now, how high was this hatch coaming above the deck, if you can tell us?

A. About three feet off the ground, off the deck.

Q. And how high would these beams that were—was that higher or lower than the coaming, hatch coaming?

The Court: He answered that already.

Q. How much lower was it than the—

A. About 12 inches, a little more or a little less.

The Court: Before he said a foot, now he said 12 inches. Don't make him answer the same thing twice.

Q. Now, in reference to the lighting in that hatch, could you tell us something about what the lighting was?

A. Well, it was very poorly lit.

Q. What was the lighting that you had there, what was it?

A. Just one light.

Q. And where was that one light?

A. It was a cluster.

Q. A cluster light. And where was it?

The Court: Do you know about where it was?

The Witness: No, I couldn't say where it was.

[fol. 212] The Court: Was it above the area you were in?

The Witness: It was above the area, but I can't say whether it was in one corner or the other.

Q. And who furnished that light, could you tell us?

The Court: If you know.

A. The ship.

Q. Now, after this plugging by the ship's crew, as you described it, what was the next thing that you did and what you observed?

A. As far as what?

Q. What happened?

The Court: Let's make sure he understands it. Now you have got the hose turned off, right?

The Witness: Yes.

The Court: It is not pumping?

The Witness: After I shut it off, and all the oil was stopped, I ran down to inform Ed Donohue of the break.

By Mr. Baker:

Q. Then what happened?

A. Then the both of us went over there, we went back on board, surveyed the situation, went back and got some more fittings, and repaired it.

Q. Then you came back?

A. Then we came back.

The Court: Who did the repairing?

The Witness: Me and Donohue.

Q. Then what happened after that?

A. After that we tried to get suction again.

Q. And did you get suction again?

A. No, sir.

Q. Did you ever get suction again?

A. No, sir.

Q. Then what was the next thing that took place?

[fol. 213] Mr. O'Neill: Can we have a time for this now?

Mr. Baker: Yes.

The Court: Can you approximate when this was?

By Mr. Baker:

Q. About what time was that? We are talking about the time when you had brought——

Mr. O'Neill: I object to the leading.
Mr. Baker: I want the time. Time for what?
The Court: The time when he and Donohue tried to fix it and the suction didn't work.
The Witness: It must have been after 12.
The Court: After midnight?
The Witness: That's right.
The Court: How long did you fool around trying to fix it, what time did you consume trying to fix it?
The Witness: I'd say 45, maybe an hour.

By Mr. Baker:

Q. Now, was there any officer of the ship present during the time that you were doing this work that you were describing?
A. Yes, there was.

Mr. O'Neill: Now, is this after 12:15 or before 12:15?
Mr. Baker: During this entire time.
The Witness: That's while we were repairing the pump, there was ship's officers and crew down on the same deck.

Q. And then I think you said that you couldn't get suction. What did you do then?
A. Well, then Mr. Skovgaard came down.
Q. Yes. Well, who called Mr. Skovgaard?
[fol. 214] A. Well, I believe—I mean, Mr. Sexton or Donohue called him.

Mr. O'Neill: How do you know?
I am going to object.
The Witness: Well, I don't know.
The Court: All right, say you don't know.

By Mr. Baker:

Q. And then did Mr. Skovgaard come aboard the vessel?
A. He did.

Q. And could you tell us about what time it was when you first saw him aboard the vessel, if you can remember the time?

A. About a quarter to one, something like that.

Q. What time was it that he had fallen into the hold, what time was that about?

A. About one o'clock.

Q. One a.m.?

A. Something like that.

Q. Now, when you first saw Mr. Skovgaard, tell us just what you observed, what you did, where he went, and so forth; could you tell us that?

A. All right. You mean from the time I seen him?

Q. Yes.

A. Well, I seen him up on deck here [indicating]—well, it was me and Ed working on the pump. I was here [indicating]——

The Court: You don't have to mark that too much. You and Ed. That's Donohue.

The Witness: Yes.

The Court: You were by the pump?

The Witness: That's right. I was over here and Donohue was on this side [indicating]. I glanced up from my work——

The Court: Now wait till we get that straight. Donohue [fol. 215] was on the forward side.

The Witness: He was on the forward side.

The Court: And you were on the aft side?

The Witness: Yes, on the aft side, near this edge [indicating].

The Court: You were trying to repair the pump?

The Witness: We were trying to get suction. The pump was already repaired.

The Court: Trying to get suction.

The Witness: That's right. Then I noticed Mr. Skovgaard appear, and he was coming down. I just seen his back.

The Court: The port side ladder he was coming down?

The Witness: The port side ladder. Then we were still working. Then after that, when I glanced around, I seen him in this corner here [indicating].

Mr. Baker: You are marking it with an ink "x".

The Court: He has got him the same place where Donohue put him.

The Witness: Yes, right here in this corner.

Mr. Baker: Aft on the port side.

The Witness: Port aft corner.

Mr. Cunningham: The aft port corner of the port tank?

The Witness: That's right.

A. [continuing] Then Ed was near the switch, and I told Ed—I'd tell him, "Throw the switch," so I would tell Ed, "Put the switch on." And I would be on the little bleeder valve. The pump would be running, and I would test the valve, see if we had any suction. And there wasn't any, so I would relay it back to him. Then he thought [fol. 216] a while——

Q. By "him" you are referring to Carl Skovgaard?

A. Skovgaard. And Skovgaard thought a while. He said, "Shut it off." I shut it off. Then he said, "Start it up again." I'd tell Ed to start it up. It was then, after he started it up, it was running, I couldn't get no suction, then he come around, walked around here, stepped up on the beam——

The Court: Now, hold that a minute. He walked——

The Witness: Walked around here [indicating].

The Court: Toward the starboard side.

The Witness: Yes. Stepped up on a beam and commenced to come forward. He placed one foot on the tank top, on the port tank top. And then when he had his left foot—was still on the beam, he slipped.

The Court: He slipped?

The Witness: Yes, he slipped.

By Mr. Baker:

Q. What was there at the portion where he slipped?

A. There was oil.

Q. What happened to him then?

A. Toppled right over, right into the tank.

Q. Into the open tank?

A. Into the open tank.

Q. Were any guards, or any ropes, or any kind of protection around this open tank at that time?

A. No, sir; none at all.

The Court: Wait, we ought to get that straight now. I don't think that the respondents are going to maintain that there was any guard, or any ropes there, are you?

Mr. O'Neill: No.

Mr. Baker: I just want the record to show that it was [fol. 217] open there.

The Court: Now, you know that there was oil at the point where he stepped on that——

The Witness: Yes, sir; there was oil.

The Court: There was.

The Witness: Yes, there was oil.

The Court: Did anybody say to Skovgaard as he was coming around, "Be careful, it is slippery around here"?

The Witness: No, I don't remember anything like that.

The Court: No warning of any kind?

The Witness: No.

The Court: Did he walk over slowly, Mr. Russo?

The Witness: Well, when I seen him come down——

The Court: I mean once he started to come toward where you and Ed were working.

The Witness: He just walked over casual like, the way he normally would, come up here——

The Court: And you saw him put one foot up on that.

The Witness: Yes, sir. I was right there.

The Court: What are these again?

The Witness: Tank top—oh, the beams.

The Court: You saw him put one foot up on the beams?

The Witness: Yes, sir.

The Court: Was he coming toward you?

The Witness: He was coming toward me.

The Court: Toward the pump there?

The Witness: Toward me and the pump.

The Court: And he had one foot up.

The Witness: One foot up on the tank top.

[fol. 218] The Court: On the tank top.

The Witness: And his other foot gave.

The Court: His other foot gave. Did you see him actually go down into the tank?

The Witness: I seen him. I even tried to reach for him and grab him.

By Mr. Baker:

Q. You were in front of the pump, as you described?

A. I was right here [indicating]. And he just slipped. And after he slipped, he just went sideways.

The Court: He wasn't running.

The Witness: No, sir. No, he was walking.

The Court: Just walking.

The Witness: He was walking, just normally like taking his step.

The Court: Do you people wear special shoes when you work on jobs of this kind?

The Witness: No, a regular steel-tipped shoe. A safety shoe, with a leather sole.

The Court: Now, when you and Ed started to work around that pump did you observe oil around the pump?

The Witness: Yes, there was.

The Court: Well, what did you and Ed do about the oil around the pump?

The Witness: We squeegeed some of it away, right around the immediate working area. By that time most of it had dripped off into the tank, onto the cover.

The Court: But you did squeegee around where you were working?

[fol. 219] The Witness: Yes. Then the rest of it just oozed off the tank top, pushed it aside.

The Court: Did anybody squeegee off this forward floor here?

The Witness: No, sir.

Mr. O'Neill: When you say, "No, sir"—if I may suggest—the other gentleman said he did. He didn't do it.

The Witness: No, that was the ship's crew that was doing that.

The Court: Were they doing it?

The Witness: They were taking care of it—there was activity going on right in the forward part of the ship.

By Mr. Baker:

Q. Who was doing that cleaning?

A. The ship's crew.

Q. You saw that?

A. Yes.

Q. Did any of the ship's crew do any cleaning in the vicinity of the hatch beams and hatch covers?

A. No, sir.

Q. And whose job is it to clean a vessel?

Mr. O'Neill: I object.

Q. [continuing] If you know.

A. That's the ship's crew.

Q. Was it any part of your job to do any cleaning of the vessel?

A. Our job is to pump.

The Court: Suppose in the process of pumping you slop up a place. Whose job is it to clean it?

The Witness: Well, we clean our immediate area.

The Court: Well, assume you would let—this is just a general question—assuming you slopped up that whole deck, through your carelessness, or through that machine breaking or something, who would clean it up, you or the crewmen of the ship?

[fol. 220] The Witness: That would be the crew.

The Court: They would?

The Witness: That would be the crew.

Mr. Baker: Similar to a longshore case.

Mr. O'Neill: I object to that.

Mr. Baker: The crew does the cleaning of the vessel.

The Court: The same principle as the Arabians. They make the dirt, and instead of cleaning the dirt, they move the tent and leave the dirt there for the next one. I was always taught that he who makes dirt, cleans it.

So that no matter who slops up the ship, the crew has to clean it, is that right, from what you know, Mr. Russo?

The Witness: That's my opinion, sir.

Mr. Baker: That also applies on land. If somebody comes to my house—somebody else may dirty my house, it is my house, I have got to clean it.

The Court: You are supposed to clean it, I know.

Mr. O'Neill: I think if anybody came in there and threw dirt there Mr. Baker wouldn't be so humble about it.

Mr. Baker: Well, if they sued me I would have to pay.

The Court: I am just talking generally. I am not thinking about admiralty law right now.

Off the record.

[Discussion off the record.]

Mr. Baker: Cross examination.

Cross examination.

By Mr. O'Neill:

Q. You say you were working on this pump. Now, how were you facing when you were working on the pump?

A. I was facing forward.

[fol. 221] Q. When you say forward, this way, you mean?

A. This way [indicating].

Q. So that you (sic) back was to the open part of the tank, is that right?

A. That's right.

Q. Nevertheless, you saw a man coming down in back of you, down the ladder, is that right?

A. I was facing forward. I could still see what is going on up here.

Q. Did he go all the way down to the deck?

A. I don't remember, all I seen, I seen his back here, and that's it. Then I faced what I was doing again.

Q. What was over in here? I am pointing now to the port side of that——

A. The port side?

Q. Yes.

A. Well, there wasn't too much oil in this section.

Q. What else was in there?

A. I don't remember what was in there.

Q. Do you remember cargo there?

A. No, sir.

Q. But you remember seeing a man come down this ladder, but you didn't take the trouble to look at him thereafter until you saw him up in this corner?

A. That's right.

Q. Now, again, since you were facing forward, you had to see him behind your back, didn't you?

A. Because he kept relaying orders to me. Then I would turn around to him.

Q. And then looking forward you saw him go at a normal gait across this hatch and down into here [indicating], is that correct?

A. No, he gave me the order, then I watched him, I watched him come over.

Q. Why? You had your order, why didn't you carry it out?

A. He told me to shut the pump off. As he told me to shut [fol. 222] the pump off he commenced to come around.

Q. I thought you said he said, "Try it again"?

A. Yes, he gave a few orders, and then on the last one he commenced to come around.

Q. Where was the motor in this pump?

A. I can't recollect where it was.

Q. That's important, to know where the motor of the pump was when you were working, isn't it?

A. Let me think about it. I think the motor was on the port side.

Q. You think it was. You don't agree with Mr. Donohue as to where the working part of the pump was, do you?

The Court: That presupposes he knows where Mr. Donohue put it.

Mr. O'Neill: I am pointing, fir, (sic) to the Exhibit, this red mark that was put here by Mr. Donohue.

Q. You don't agree that that is where the suction line was, do you?

A. No, I believe it was here [indicating].

The Court: On the starboard side.

Q. And you were down there working on this pump for about an hour, weren't you?

A. Yes, the both of us were.

Q. But you remember seeing oil on something that was down here—I am point (sic) now to the beams—you remember seeing oil there, and you can't remember where the part of the pump was that you were working on; is that what you want us to believe?

A. No. The nipple that broke off was on the starboard

side, because that is where we worked at. It was on this side [indicating].

The Court: Starboard side.

Q. That doesn't answer the question, does it?
A. Maybe you didn't make it clear.

[fol. 223] The Court: What do you want to know, where the motor was on this?

Mr. O'Neill: Yes.

The Court: Do you know where the motor was?

The Witness: The motor was on this side here [indicating]. If the discharge end was here, the pump would be here.

Q. Now I am not asking you to reason, we want to know where it was. And you say that the pump wasn't resting on the two hatch covers?

A. It was resting on one. But this hatch cover was resting on the starboard tank top.

Q. And how much space was there between where you were working here and the edge of the tank?

A. I'd say about this much [indicating].

The Court: About a foot, a foot and a half.

The Witness: Yes.

Q. And you were working there with your back to this opening behind you?

A. That's right.

Q. Is that the usual way you work on these tanks?

A. Well, if that is where the pump was, that is where I had to work.

Q. Now, then you say you came down here—of course, it was all oil on this cover, wasn't it?

A. On the cover there was.

Q. And to get around here he had to walk through this oil that covered the deck, is that correct?

A. Well, I don't know how he got back there.

The Court: You mean Skovgaard?

Mr. O'Neill: Skovgaard.

The Court: Well, let's get that straight, too.

By Mr. O'Neill:

Q. Was there oil in here [indicating]?

[fol. 224] A. No, because any oil that was on here dripped back onto the tank and off here.

Q. Well, how could it drip back into the tank if this cover was raised on the other cover, wouldn't it run back into here? It doesn't run uphill, does it, cocoanut oil?

A. But this side was dry here.

Q. That is not the question.

Mr. Baker: When you say "this side" you are referring to the port side.

The Witness: This area here [indicating].

By Mr. O'Neill:

Q. This tank cover you tell us was up so that it was on an angle?

A. That's right.

Q. Now, if any oil was on that, it certainly wouldn't run off here, would it?

A. Well, most of it would be squeegeed off.

Q. Let's just get what it did this time. Run down here?

A. Yes.

The Court: Is that tank cover a flat surface, Mr. Russo?

The Witness: It is.

The Court: A flat surface.

The Witness: Flat.

Q. And, of course, this cover, if it was as you said it was, it would mean that the oil ran off here, would collect at the foot of this port ladder, wouldn't it?

A. There wasn't that much of a pitch.

Q. Well, how much of a pitch was it?

A. It was just slight. I mean I couldn't say for exact.

Q. Well, tell us, how thick was this cover?

A. I couldn't be sure.

[fol. 225] Q. You couldn't be sure. But there was a pitch?

A. Just slight.

Q. And the oil was hot enough to run, wasn't it?

A. Yes, it was.

Q. So if there was any oil collected on here it would naturally go into this spot right at the foot of the port ladder, wouldn't it?

A. It would probably collect around here [indicating].

Q. And you also told us there was a lot of oil up in here?

A. I didn't say here, I just says around here.

Q. Were you ever up in this spot?

A. Yes, I was.

Q. When?

A. After everything broke I picked a dry spot to survey the situation.

Q. Then if you picked a dry spot then there must have been oil up there, isn't that correct, because when you talk about a dry spot——

A. Where he was standing, that was a dry spot.

Q. And was there oil in here? I am looking at the after end of the tank.

A. No, sir; there was no oil back here.

Mr. Baker: When you say "back here" you mean aft of the port tank?

The Witness: That's where Carl Skovgaard was standing.

By Mr. O'Neill:

Q. Was there any oil—now I point to the starboard corner of the port tank—was there any oil up in there?

A. Right around here [indicating].

Q. Where I put my pencil, right at the corner?

A. No, I couldn't say for sure there.

Q. But you know there was oil here [indicating].

A. There was oil there.

[fol. 226] Q. You went down and investigated that.

A. Because there was oil around here——

Q. Just a moment. Did you go down and look at that spot after the accident?

A. I walked all over the place. I didn't exactly check that spot. I just noticed oil all over the place.

Q. Now, when you came down on this ship there was a leak in the pump at that time, was there not?

A. No, sir; there was no leak.

Q. What were you going ashore to get rags for?

A. Well, use the rags because your hands always get oily, and you have to wipe them, you have to wipe parts of the machine.

Q. Had you been on the ship before you went for the rags?

A. Yes, sir; I spent about 20 minutes up there.

Q. Well, you knew when you went on the ship that you were going to need rags to wipe your hands, didn't you?

A. Well, usually there are some up there, but there wasn't any at this particular time, so——

Q. Who would put the rags up there, Mr. Russo?

A. I don't know.

Q. That would be somebody from your company?

A. It would be.

Q. At this time they didn't have any rags there?

A. Wait. Whatever rags there was up there was already oil soaked. Whatever rags were up there were already oil soaked, so I had to get some dry ones.

Q. What were you going to do with these dry rags?

A. Had to use them to wipe my hands, wipe the pump.

Q. Why did you have to wipe the pump?

A. Because there is always an amount of oil that you [fol. 227] are going to get on your hands, you have to turn fittings, grease fittings.

Q. You have grease up there, too, do you?

A. Yes, for the fittings, in the grease cup.

Q. And did you have a bucket there to catch the leak?

A. Yes, sir; under the flange.

Q. And did you use the cocoanut oil on the bearings to cool them off?

A. No.

Q. How did you cool the bearings?

A. The bearings were cooled with grease. The bearings leaked a—the flange leaked a little bit, but we had a bucket underneath, because if you tighten it too much, why, she will smoke. So you have to leave a little oil drip out in order to keep that flange lubricated. Then the oil I would dump back into the tank, put the bucket back.

Q. In other words, what you people were going to do,

you were salvaging as much of this oil as possible, weren't you?

A. I guess we were. I just couldn't throw it overboard.

Q. Now, you said before——

The Court: Now, wait, Mr. O'Neill.

Mr. O'Neill: I thought he was finished.

The Witness: I said we couldn't very well throw the oil on the floor, or throw it overboard. The normal thing to do with a bucket of oil would be to throw it back in the tank.

Q. And that's salvage.

A. Well, you wouldn't throw it on the floor.

Q. Now, when you went down there, you and Donohue, you say you cleaned the working place where you were going to work, is that correct?

A. The immediate area.

Q. Well, you didn't call any of the ship's crew and say to the ship's crew, "We want to work here. It is your job to [fol. 228] clean this and we want you to clean it for us," did you?

A. None of the ship's crew was cleaning down there, they were just cleaning the forward part.

The Court: That is not the question. Did you ask the ship's crew?

The Witness: No, sir; we didn't.

The Court: You did not.

By Mr. O'Neill:

Q. And you and Donohue went down with a squeegee, as Donohue told us this morning, and with the rags, and you cleaned this off because that is where you fellows expected to work, isn't that correct?

A. That's right.

Q. Now, when you called this man down to fix the pump, that ordinarily would be the area where he would work, too, wouldn't it?

A. What do you mean by that?

Q. Skovgaard.

A. Well, yes, that would be the area, too.

Q. So that what you fellows did, you cleared as much

away as possible so that you could work and finish this job that you were down to do?

A. That's right.

Q. And at the time that you were working here you were having trouble with this pump, and you had had trouble with the oil running back from the discharge line, hadn't you?

A. That is when she started to leak. That's after the nipple broke.

Q. There wouldn't be much sense in cleaning up this space while you fellows were working there, would there?

A. Well, you had to, you had to clean it up, the immediate area.

Q. Well, you did that. You people, you didn't tell any member of the crew, "It's perfectly all right now, we have [fol. 229] this pump under control, everything is going on, everything is normal, we are under control," did you?

A. No, sir.

Q. So far as anybody there watching you people were concerned, with three of you down there working, there wouldn't be much sense in cleaning up the space at that time, would there?

Mr. Baker: I object to the question. That is a conclusion for the Court.

The Court: I will sustain the objection.

Q. Now, you say you called on the crew to come down and plug this?

A. No, sir; I didn't call on them, they were there.

Q. What were they doing there?

A. They came down to stop that leak, they put a plug in the hole.

Q. This is what time at night?

A. It must have been maybe about 11:30, because as soon as I was informed of the leak I ran on board, went downstairs and shut it off. Then we got back pressure. Then the crew came down there immediately, a minute after, and they plugged that up.

Q. How many members of the crew?

A. There was more than one, more than two. There was a series of them.

Q. Do you remember?

A. No.

Q. This was at night; the ship wasn't working, only at this hatch?

A. That's right.

Q. And you say there was more than two?

A. Yes, sir.

Q. More than three?

A. Because there was a lot of commotion going on down there.

Q. I am not asking you that. You said this nipple that we are talking about—how big was the leak in it?

A. It was a spout, like a gusher.

[fol. 230] Q. And they put a plug in it, you say?

A. Yes, sir.

Q. Now, was that before or after you stopped the pump?

A. That's after I shut off the pump.

Q. And then after the crew did that, and stopped it, and held that, you had to break that connection, didn't you, to put in this "T" that Donohue came with?

A. Yes, sir.

Q. And, of course, when you broke the connection there was more oil in the pipe, wasn't there?

A. By that time the oil had drained down. There might have been a little that collected in there.

Q. But when you broke the connection in this line, there was oil in the line, wasn't there?

A. Very little.

Q. Was there oil in the line?

A. Very little.

Q. It was necessary for you to clean it up as it came out?

A. No, there wasn't that much.

Q. So you left that oil there where you and Donohue were going to work?

A. No, we didn't leave it there. We pushed it aside, we squeegeed it out of the way.

Q. Now, when you called Skovgaard—did you call Skovgaard?

A. No, sir.

Q. You didn't tell any members of the crew, did you,

that were down there that you were bringing on an expert to fix this?

A. No, sir.

Q. And at the time he came on there wasn't anybody there but you fellows, was there?

A. That's right.

Q. And no member of the crew?

A. There was crew members down there.

Q. Where were they?

A. They were already up forward.

Q. How many?

A. I can't remember how many there were.

[fol. 231] Q. Now, you said these fellows were cleaning up. How can you clean up hot oil?

A. Well, they were more—they were concerned about the cargo below.

Q. And how do you clean up hot oil?

A. I don't know.

Q. It is thinner than water, isn't it; or as thin as water, almost?

A. It congeals at 70 degrees.

Q. Were they waiting for it to congeal and shoveling it up?

A. No.

Q. Did you help shovel any up after the——

A. No.

Q. —after the accident?

A. No.

Q. What would this crew be doing; you say they were cleaning; how were they cleaning it up?

A. As far as I can recollect, they were taking off the hatch covers to see what damage was done to the cargo below.

Q. And this, of course, was after the accident, wasn't it?

A. That was after the break.

Q. And they were looking down at the cargo below, you say? How many?

A. I don't know.

Q. Do you remember now?

A. No.

Q. How many men would it take to take the hatch covers off?

A. I don't know.

Q. So you were watching them doing that?

A. No, I just glanced, just seen them at a glance.

Q. And you also saw the man coming down the ladder behind you, is that correct?

A. Well, you can notice a lot of activity.

The Court: Well, was the ladder behind you?

The Witness: It was on the side of me.

The Court: On the side of you.

[fol. 232] The Witness: On the side. It was like I am facing this way [indicating] and here is the ladder right there.

By Mr. O'Neill:

Q. You were facing what way?

A. This way. Let's assume that——

Q. No, let's assume on the plot here.

A. I am facing this way.

Mr. Cunningham: Which way is that?

The Witness: Forward. That's the forward section of the ship.

The Court: And is the ladder forward?

The Witness: No, it would be on the port side.

Mr. Cunningham: But forward of where you are standing?

The Witness: That's right, forward, port.

By Mr. O'Neill:

Q. Now, the last time you saw Skovgaard on deck, was he here where this "S" is; where was he?

A. No, I just seen him coming down here.

Q. Well, where did you see him when he was on deck?

Mr. Cunningham: Indicating the port side ladder.

A. Right here, by the port side ladder.

Q. Is that the first time you saw him, when he came to the port side ladder?

A. Yes.
Q. You didn't see him when——
A. No.
Q. Did you hear him call down to Donohue when he was over here?
A. I can't remember.
Q. You can't remember. Where was the gangplank on this ship?
A. It was on the starboard side.
[fol. 233] Q. So what he did was, he came on—and this was open up here, too, on the main deck, wasn't it, the hatch?
A. I think it was.
Q. He came on, up the gangplank here, and walked all the way around here, to come down, is that it?
A. I don't know.

The Court: You don't know what he did.
The Witness: I don't know what he did. All I know is I seen him here.

Q. And that is the first time you saw him?

Mr. Baker: When he says "here" he indicates the port ladder.
The Witness: The port ladder.

Q. But the first time saw him was where this—will you mark on here with your pencil?
A. He was coming right here [indicating].
Q. No, the first time you saw him.
A. He was just coming over the side.

The Court: The port side ladder.
The Witness: The port ladder. I am sorry.
The Court: We will take a five-minute recess.

[Short recess]

By Mr. O'Neill:

Q. That work you had to do down there, Mr. Russo, is that close work; by that I mean, you had to be able to see what you were doing?

A. Yes, we had to.

Q. And I think you said the light was up in this port after corner, is that correct?

A. I didn't say where it was.

Q. Do you know where it was?

A. No.

Q. But you say there was only one light?

A. Just one light.

[fol. 234] Q. Did you have your back to the light?

A. From that position, I guess I did.

Q. Were you working down here, trying to tighten up on these fittings, grease and all the rest of it, in your own shadow, is that correct?

A. No, there was light, but not enough. I mean you could still see what you were doing, but you could have used more light.

Q. Well, you had your own electric line running from the pier, didn't you?

A. Well, that I don't know.

Q. Well, this pump, didn't you supply the power to the pump?

A. Just the power, but not the lights.

Q. I didn't ask you that. To supply power to an electric pump you have to have an electric line coming aboard, don't you?

A. That's right.

Q. Did you have any lights down at the plant?

A. At the plant, yes, we did.

Q. But in spite of the fact that you had been on this ship and thought it needed more lights, you walked off to get rags but didn't bring lights back, is that correct?

A. No, sir.

Q. Is that correct?

A. That's up to the ship, to supply the lights.

Q. I didn't ask you that. You went to get rags?

A. Rags.

Q. But it wasn't light enough for you to work down there?

A. Well, there was light, but it was poorly lit.

Q. Now, when you went down—or when somebody went down in the tank to get Skovgaard they had to have lights, didn't they?

A. That's right.

[fol. 235] Q. And there wasn't any difficulty in getting a light to put down in that tank, was there?

A. Well, right after he fell in—may I explain it?

The Court: Yes, go right ahead.

A. [continuing] Right after he fell in me and Donohue went down the ladder. And it was dark down there, you could barely see. So we yelled for a light. It was then that the ship's crew lowered one down.

Q. How long did you have to wait for the light after you yelled?

A. About a minute or so.

Q. Now, if there was only one light in the upper 'tween deck there, it would have left the upper 'tween deck in complete darkness, wouldn't it?

A. There was complete darkness, as far as I can remember. We had the immediate light downstairs, and when I look up it was dark.

Q. And when you came up it was dark, too?

A. No, by that time they had thrown more lights up there.

Q. Is this your signature, Mr. Russo?

[Document handed to the witness]

A. Yes, it is.

Q. You say here, "On December 6——" You have seen this statement just before you came to court, haven't you?

Mr. Baker: Would you identify it? As I understood, there were a number of statements claimed to have been signed by this witness. Could you identify which one and who took it?

Mr. O'Neill: Taken at Bayonne on December 8, 1952.

Mr. Baker: Who took that, do you know?

Mr. O'Neill: Mr. Clabault.

Mr. Baker: Who is that? Can you tell us who Mr. Cla-

[fol. 236] bault is?

Mr. Cunningham: May I suggest that that statement be marked for identification?

The Court: Yes, that is the best way.

Mr. Baker: I think that I and the Court are entitled to know who is alleged to have taken the statement, to have the person identified.

Mr. O'Neill: Merchant Ship Owners' Claim Bureau. The signature is on there, regardless of who took it.

The Court: Do I understand that Mr. Baker has a copy of it, that he was furnished with a copy of this statement?

Mr. O'Neill: Yes, sir.

The Clerk: R-1 for identification, statement dated December 8, 1952.

[Marked Exhibit R-1 for identification.]

The Court: When did you see the statement last, Mr. Russo?

The Witness: Probably when it was taken. I have never seen it since.

The Court: You have never seen it since?

The Witness: No.

The Court: Well, if you told the truth then, and you tell the truth now, you won't get in trouble. The truth is easy to remember. Details may be forgotten, but not the ultimate truth.

Mr. Baker: I saw this. I saw a copy of this.

By Mr. O'Neill:

Q. When did you talk to Mr. Baker before you came to court here to testify?

A. A few days ago.

Q. And during that conversation never a reference was [fol. 237] made to this statement that you had made on December 8, is that it?

A. No, sir.

Q. You were never asked about anything in there?

A. No, sir.

Q. On this statement you say, "The oil that had leaked out due to the broken pipe was on the forward end of the tank top and on the shelter deck forward of the deck coaming." I am going to ask you—is this the area you mean here [indicating], the forward end of the tank top?

A. That would be the forward end of the tank top, which would include this [indicating].

Q. Now, you also said this, "The oil that came out of the pump during repairs I wiped up with rags. It is possible that there may have been a slight oil slick on the tank cover, but no oil from original leak had spread over this point," is that correct?

A. No, sir; I don't think it is.

Q. "Any oil, if any, in this section would be what leaked out of the pump and not due to the oil spill," is that correct?

A. I couldn't have made a statement like that.

Q. Well, of coure, if this statement was true when made on December 8, your statement here that these beams were covered with oil——

Mr. Baker: I object. He has denied that he made such a statement. The question is improper.

The Court: Show it to him.

By Mr. O'Neill:

Q. That is your signature?

[Document shown to witness.]

A. That is my signature.

Q. Read the statement.

A. Do you want me to read the whole thing?

[fol. 238] Q. You read what you want.

A. "My name is Salvatore Russo and I live at——"

Mr. Baker: Do you want him to read it to himself?

The Witness: All right.

The Court: Didn't you show this statement to him when you had a witness conference with him?

Mr. Baker: I didn't go into the statement, your Honor.

The Court: You did not?

Mr. Baker: And I will tell you why.

The Court: I don't want to know why. I am not going to tell you what to do when you have a conference.

What was the part that Mr. O'Neill specifically asked him? I want to show it to him here.

[Record read.]

Mr. Baker: Your Honor, just to correct the record.

I don't think I have that statement. I see another one here.

The Court: You don't have this particular one?

Mr. Baker: I haven't got it, your Honor, I have got statements from the crew, and so on.

The Court: The witness has read page 1 of the statement dated December 8, 1952, taken at the office of the El Dorado Oil Company by H. Clabault. He has read the last paragraph of that page.

Now that you have read that, does it refresh your recollection at all about anything you said?

The Witness: No, sir; I don't remember making any statement like that.

The Court: You do not.

[fol. 239] Mr. Baker: Your Honor, to correct, the situation——

Mr. O'Neill: I will offer it in evidence.

Mr. Baker: Mr. Watson stated that he had sent me this statement, pursuant to order. I have the letter with which he sent me a number of statements from the ship's crew, and so forth, but not the——

Mr. Watson: I was in error, your Honor. The only thing that is required by your order, after Mr. Baker's motion for discovery, were statements of our officers, and any other statements were not included in that order.

Mr. Baker: So I didn't receive it.

The Court: Maybe that's all you asked for.

Mr. Baker: I just want your Honor to know that I didn't receive it.

The Court: All right, you did not get a copy of the statement in question.

By Mr. O'Neill:

Q. I want you to look at your signature there, Mr. Russo—or look at the signature on that paper.

A. That is my signature.

Mr. O'Neill: I think that is all, sir.

The Court: The statement is being offered in evidence.

Mr. Baker: I object to it.

The Witness: If I ever gave that statement——

Mr. Cunningham: Just a moment.

The Court: Do you have anything to say about it?

Mr. Baker: I object to it. The proper way to contradict the witness is to bring the person who is alleged to have taken the statement so that we can examine and cross [fol. 240] examine him, the circumstances, what he said and didn't say. They just can't toss a paper into evidence.

The Court: He is not tossing it in. The man said it is his signature.

Mr. Baker: But he denied that it was his statement, his language, or that he ever told this person certain portions. It is their duty, I submit to your Honor, to submit that person so that they can testify as to what he said, and then we have an opportunity to cross examine him. I submit that the offering of the statement in evidence just like that——

The Court: Is not sufficient?

Mr. Baker: Is not sufficient. And it is improper to offer it under those circumstances.

The Court: All right. Now wait till we see what Mr. Cunningham has got to say about it.

Mr. Cunningham: I have no objection.

The Court: Well, that is not unusual. If the statement helps his side there is no objection.

Mr. Baker: I haven't even looked at it, but I am objecting for the reasons stated.

The Court: If you give me a good reason, maybe I will sustain it. But I won't sustain it for no reason at all. The man says it is his signature, both sheets.

Mr. Baker: But he denies making such a statement which appears above his signature. And I submit that it is their duty to present the person who is alleged to have taken the statement so that he can be examined and cross examined as to the circumstances and what took place.

The Court: I'll tell you what I will do. I want to be [fol. 241] fair with you. I will not make a ruling on its admissibility or non-admissibility, but you have got to show me that it can't go in, and then I will rule on it.

You have got to show me how it is not admissible. You have overnight to give it to me tomorrow.

Mr. Baker: May I be permitted to look at the statement?

The Court: Sure. It is marked for identification.

[Document shown to counsel.]

By Mr. O'Neill:

Q. Do you need any tools to do what you were doing here on the pump?

A. As far as—yes, you need a crescent wrench.

Q. Do you need any other wrenches?

A. No, just a crescent.

Q. Now, on a pump like this, when you don't get suction—you said you were holding the bleeder valve—how does that work?

A. Well, you have got your four-inch line, the flange, and you have got a bleeder valve coming off—I think it is a quarter inch valve—and when that thing is spouting oil it means you have got suction—that's how you can tell, you blow air in it and oil comes out, it means you picked it up—when that happens you shut it off and you know you are pumping.

Q. And how long had you been trying to get suction on this line before anything happened to Mr. Skovgaard?

A. Possibly a half hour or so.

Q. And he was there for how long of that half hour?

A. He was only there for about 10 minutes.

Q. He was around there for 10 minutes while you fellows were trying to get this going?

A. That's from the time I seen him up on that port ladder.

[fol. 242] Q. At any time was it suggested that you drop the pump down into the tank?

A. No, sir.

Q. Of course, you don't know much about the capacity?

A. No, sir; I don't.

Q. Were you ever told by Mr. Skovgaard to get some wrenches?

A. No, we had them on hand.

The Court: That is not the question. Were you told by Mr. Skovgaard?

The Witness: No, sir.

Q. Had he told you before you had them on hand to get wrenches?

A. Pardon?

Q. Had he told you to get them before you had them on hand? Let me straighten this out. You say you had them on hand?

A. We had a bucket there with bolts and a wrench in it.

Q. And did you get that in accordance with instructions received from Mr. Skovgaard?

A. No, we had a wrench over there—rather, the tools that we used to put the flange together——

Q. Did you have the spanner wrench there? That's what you mean by a crescent, don't you?

A. I don't know whether you call it a spanner—it is sort of a—a regular crescent tool.

Q. Did you have any Stillson wrenches?

A. I can't remember.

The Court: Raise your voice.

The Witness: I'm sorry.

A. I can't remember.

Q. At any time that night were you asked to get a Stillson wrench?

A. No, sir.

Q. You are sure of that?

A. No, I can't remember now. No.

[fol. 243] Q. What time did Mr. Skovgaard come aboard?

A. It must have been maybe 10 minutes to one—or somewhere around that time.

Q. What time did the accident happen?

A. About one o'clock—I can't be very sure of the time, but it's around that time.

Q. Was he on about 20, 25 minutes before something happened?

A. Well, when I seen him it must have been ten to eight minutes.

Q. When you went aboard the ship here, you didn't report to any officer, did you?

A. You mean when I came on duty?

Q. Yes.

A. No, I just reported—I reported to Mr. Sexton.

Q. And Mr. Sexton told you what you were to do on the ship?

A. That's right. I was to relieve Sampson.

Q. And by relieving Sampson, did that mean you were to stay down the hold and watch the pump, is that all?

A. Yes, and service it.

Q. Now, in servicing the pump, and taking care of the pump, the ship's officers have nothing to do with that, have they?

A. No, sir.

Q. And the ship's officers have nothing to do with telling you whether or not you can or can't get suction on a pump?

A. No, sir.

Q. Now, did anybody tell you that this job had a "hurry up" so that you wouldn't be responsible for demurrage on the ship?

A. No, sir.

Q. You didn't hear that?

A. No, sir.

Mr. O'Neill: That's all.

[fol. 244] The Court: Nobody told you to hurry up, is that right?

The Witness: That's right.

The Court: Where was Mr. Sexton, on the same deck that you were working on?

The Witness: No, sir; he wasn't. I don't know where he was.

The Court: You don't know where he was?

The Witness: He might have been on the top deck.

Cross examination.

By Mr. Cunningham:

Q. Mr. Russo, did you relieve Mr. Sampson on that pump?

A. Yes, sir.

Q. And during the operation of this pump, while you were on board, before the nipple broke off, there was a leak from the gland, wasn't there?

A. There was a normal operating leak.

Q. Now, if the pump were working perfectly well, would there be a leak from a gland, from a pump like that?

A. There would.

Q. Now, if the glands are tightened, what happens?

A. She starts smoking.

Mr. O'Neill: I am going to object to this witness testifying as an expert on the pump, because he isn't an expert on pumps. He is simply down there to see that this pump kept working. But I don't see how he can qualify him as to the makeup of this pump.

Mr. Cunningham: I am not trying to make him an expert, I am trying to find out how this pump works, and what happens when it is working. Let me ask him this question.

Q. Mr. Russo, had you worked with this pump before?

A. Yes, once in the scale house, once or twice.

[fol. 245] Q. And had you worked with other pumps which are similar to this pump?

A. I worked on gear pumps and roper pumps, and that type of pump.

Q. Now, in a pump such as this, while you were working on it, is it normal for it to have a leak from the gland?

A. Yes, it is.

Q. And is it possible to stop that leak in normal operations?

A. Well, if you tighten up the glands too much, she will start smoking.

Q. In other words, if you tighten up the glands to stop the leak, then the glands will get hot?

A. Will get hot.

Q. And then you have to loosen them again and allow the leak, is that right?

A. That drop of oil coming out cools it, sort of lubricates it.

Q. Now, the bucket that you described, underneath the gland, that is part of the normal operation of operating this pump?

A. To catch the oil that leaks out of the gland.

Q. And this oil that is leaking out of the gland is the normal leak in the operation of the pump?

A. Yes.

Q. Now, during the time that you were there, that is the only leak that occurred until this nipple suddenly broke off?
A. That's right.

Mr. Cunningham: No further questions.

Cross examination [Continued].

By Mr. O'Neill:

Q. How do you think that all these rags that were on the ship when you went on got so dirty and oily?

Mr. Cunningham: I object to the question. How does he think?

Q. How did these rags that were on the ship when you [fol. 246] went on there, how did they get so oily and greasy, if you had to go ashore for other rags, if this was a normal situation?

Mr. Cunningham: I object.
The Court: Now, this gentleman testified that he had to go up to get more rags because those that were on the deck were so dirty and greasy, and full of oil, or something, so that he was compelled to go up and get dry rags.
Mr. Cunningham: Since he wasn't there how does he know how they got however they were?
The Court: All he has got to say is "I don't know."
Mr. Cunningham: Then I withdraw my objection.
The Court: Is it true that the rags that were on that deck when you came down were soaked, and wet, or oily?
The Witness: They weren't soaking, but they were—there was just the normal amount of grease. You handle flanges and you always get grease on your hands. So I figured, "Well, I will get a few clean ones."
The Court: So the condition was not unusual?
The Witness: No, it was not unusual.
The Court: I see. That happens.

By Mr. O'Neill:

Q. Is it normal for the nipple on these pumps to burst at times?
A. Well, I mean, who can say what is going to happen?

The Court: Is that the first time in your experience that a nipple broke?

The Witness: Yes, sir.

Cross examination [Continued].

By Mr. Cunningham:

Q. This grease cup, will you describe that; is that a small [fol. 247] cup that is used so that grease may lubricate the glands, and you pack it with grease, and then turn a screw and keep tightening it?

A. Yes, it is a cup. You pack the cup, and every once in a while give it a turn and that forces grease into the bearings.

Mr. Cunningham: I didn't think we understood that.

The Court: Is it a small cup?

The Witness: I'd say about this big [indicating].

The Court: A circumference of about two inches, would you say?

The Witness: About two inches, and about that high [indicating].

Mr. Cunningham: And a height of about an inch and a half, two inches.

The Witness: About that high.

The Court: Yes.

Redirect examination.

By Mr. Baker:

Q. You stated before, when Mr. O'Neill questioned you, about the crew of the ship was doing some cleaning on the forward side of these hatch covers, near the cargo hold, and I think you said that was after the break that you saw them doing the cleaning?

A. That was after the break.

Q. Was that before the accident when Mr. Skovgaard fell into the hold?

A. That was before the accident.

Q. And how long before it was that?

A. Well, right after we closed up the leak, right after the

peg was put in there, then they started to get busy up in the front, up in the forward part of the ship.

Q. What time was that, could you tell us, approximately?

A. It was close to 12 o'clock.

Mr. Baker: That is all.

[fol. 248] Recross examination.

By Mr. O'Neill:

Q. You say Mr. Skovgaard put his right foot up on the hatch cover, is that correct?

A. Well, I couldn't be certain whether it was the right, but he put one foot up on the hatch cover.

Q. You were looking at him now. Will you try and think which foot he put up on the hatch cover?

A. I can't remember. But he put one up there.

Q. And he had that foot solidly on the hatch cover, did he not?

A. Well, I couldn't say whether it was solid, but he had it up there, and as he commenced to take the other one, he just slipped.

Q. Well, the pressure would be on the foot which was on the hatch cover, wouldn't it, and not on the beams?

The Court: Don't answer unless you can.

Mr. O'Neill: I will withdraw it, sir. All right.

Mr. Cunningham: No further questions.

The Court: Step down, Mr. Russo.

[Witness excused.]

The Court: You wouldn't have a short witness, would you, Mr. Baker?

Mr. Baker: Well, we might as well carry on until tomorrow morning.

The Court: You wouldn't have one that we could examine and cross examine in less than 10 minutes?

Mr. Baker: I don't think so, not with this array of talent against me.

The Court: All right. We will adjourn for the day, gentlemen. We will resume tomorrow morning at 10:15

a.m. That is for your convenience, because you come from New York.

[fol. 249] [Whereupon, the hearing was adjourned until Friday, November 4, 1955, at 10:15 a.m.]

Trial resumed pursuant to adjournment.—November 4, 1955.

[Appearances as previously noted.]

The Court: Call your next, Mr. Baker.

Mr. Baker: If your Honor please, yesterday I made objection to the introduction into evidence of an alleged statement of a witness——

The Court: Russo.

Mr. Baker: —when the witness, Russo, was on the witness stand. And your Honor gave me the opportunity to present some citations.

The Court: That's right, sir. To show why it was not admissible after it had been shown that there were discrepancies between his testimony on the stand and his signed statement.

Mr. Baker: I present to your Honor the case of Bitterman against Marino, a decision of the Supreme Court of New Jersey, 158 Atlantic 495.

The Court: All right. Now, you leave that with me. We don't have to waste time on that now. I will go over it carefully and if it stands for what you say it stands, it will be admitted.

[fol. 250] Mr. Baker: It is directly in point, the same argument.

The Court: If it is directly in point that makes it very easy for the Court. If there is the usual leeway in there then I will have to struggle with it.

Mr. Baker: Mr. Blaney, please.

Norman W. Blaney, called and sworn for the libellant, testified as follows:

The Clerk: May we have your name, sir?

The Witness: Norman W. Blaney.

The Clerk: And your address for the record?

The Witness: 53 Linden Avenue, Springfield, New Jersey.

The Court: Have you ever been in court before, Mr. Blaney?

The Witness: No, sir.

The Court: You never testified before?

The Witness: No, your Honor.

The Court: Then let me caution you. The only testimony we are interested in is what you saw yourself, or what you heard yourself, not what anybody else told you about anything. If you don't understand the question, just say so and I will have it clarified for you. When you hear an objection, don't answer until I rule on it.

Direct examination.

By Mr. Baker:

Q. Mr. Blaney, on December 5 of 1952, the date of this occurrence for which this action is pending, by whom were you employed?

A. The El Dorado Oil Works, Bayonne, New Jersey.

Q. And what was your position with that company at that time?

A. Plant superintendent.

Q. And how long had you been plant superintendent?

[fol. 251] A. Since March of 1950.

Q. And what were your duties, generally, as plant superintendent?

A. My duties were—I was responsible for the plant in its entirety, the running of it, the efficiency, and the hiring of the personnel, and seeing that they operated in a good manner.

Q. And did Carl Skovgaard work under you?

A. Yes, he did.

Q. Were you his superior?

A. Yes, I was.

Q. And during that period of time that you worked as plant superintendent did you, in the course of your work, attend the unloading of the various products for your plant and vessels?

A. Oh, yes.

Q. And the particular product concerned here, was that cocoanut oil?

A. Yes.

Q. And did you on previous occasions have cocoanut oil unloaded from vessels in your plant?

A. Yes.

Q. How often did that take place in the period of time that you worked there?

A. Oh, I would say on the average of two a month, two ships a month, of the cocoanut oil.

Q. Did you also have other bulk products unloaded?

A. Yes.

Q. What type, for instance?

A. Well, we had copra, which is dried cocoanut meat. We have had babsu.

Q. Are these oil products?

A. These are products that oil is derived from.

Q. Now, during the course of your work, while you were working as plant superintendent, during these years that you have described—I think about two years—did you also go aboard the vessels in which the oil or the products were being unloaded?

[fol. 252] A. Yes.

Q. And did you do that on all occasions?

A. All occasions, yes.

Q. And before you worked for this plant what other work did you do?

A. Previous to this position I was with the United Distillers for six and a half years.

Q. And what work did you do for them?

A. The first part I was central engineer for all their plants, used to travel around to the different plants, and make recommendations insofar as plant rehabilitation, modernization, and checking on beer equipment.

Q. Did you also go aboard vessels where some work was being done of loading or unloading of products?

A. Yes.

Q. How long a period of time, totally, would you say that you were concerned with going aboard vessels where

some work was going on, the loading or unloading of products?

A. Around nine, nine and a half years of it.

Q. Principally, were they products like oil which were in liquid form?

A. Yes, molasses, alcohols—with the distillery, that is.

Q. Now, on this particular occasion—were you present on December 5 of 1952 when your crew first started to go aboard the vessel?

A. I was not.

Q. Were you aboard the vessel at any time during that evening before midnight of December 5 of 1952?

A. I was not.

Q. When was the first time that you came aboard the vessel, the Tungus, while it was docked in Bayonne?

A. It was approximately—anywheres from 1:30 to a quarter to two. I don't know exactly.

Q. That's after the accident to Mr. Skovgaard?

[fol. 253] A. After the accident had occurred, yes.

Q. And how did you hear of it?

A. Pat Sexton, who was my receiving and shipping foreman, who was in charge of the unloading of the oil, called me and said there had been an accident, and for me to get down right away.

Q. And you did that?

A. I did that.

Q. Now, when you came aboard the vessel, the Tungus, did you go down to the lower deck, or the shelter deck, where the unloading of this oil had been taking place?

A. I did.

Q. And was that after the body had been removed, do you know?

A. Yes.

Q. And could you tell us what you observed with reference to the condition of anything between the two hatches?

A. Yes, there were hatch beams there.

Q. Now, would you describe those hatch beams, as you observed it at that time?

A. When I came down to look at the pump——

Q. Will you describe them, how high, and where they were located?

A. To get up to the pump I had to step up onto the beams, and from there to this cover, hatch cover here, tank cover, where the pump was located.

Q. So could you tell us about how high the beams were above the deck of the vessel?

A. The top of the beams above the deck of this vessel?

Q. Yes.

A. It was a giant step. In other words, I had to step up quite a ways in order to get up on it.

Q. Could you give us an idea, please?

A. I'd say approximately two feet.

Q. And then how much space was there, if you can give [fol. 254] us it approximately, between the top of the beams and the tank cover?

A. A normal step from there up, from the top of the beam to the tank cover was a normal step.

Q. How much would you say that is?

A. Nine and a half, ten inches.

Mr. O'Neill: We can't hear you.

The Witness: Nine and a half to ten inches, possibly.

By Mr. Baker:

Q. Did those beams occupy—how much of the space did it occupy that was between—in other words, going fore to aft, how much of it did it occupy?

A. Well, it occupied the full space.

Q. And how many beams were there?

A. As I recall, there were two.

Q. And what is the space normally used for?

A. It's a walkway.

Q. And from your experiences aboard vessels, as you described, have you at any time seen any hatch beams in that walkway?

A. No, other than this one.

Q. And is it, in your opinion, proper to have the hatch beams in that walkway?

Mr. O'Neill: I object. I think that is for the Court to decide on the testimony.

[Record read.]

The Court: Isn't that something that I can conclude?

Mr. O'Neill: I think so, sir.

Mr. Baker: Well, you can conclude, unless your Honor wants the benefit of it.

The Court: Well, let me ask you this. Is it ordinary practice to have these beams in between these hatches?

[fol. 255] The Witness: It is not the ordinary practice.

The Court: Isn't that like asking a man: Is it proper to have a big beam on the sidewalk at night?

Mr. Baker: That's right.

The Court: Walkways are walkways.

By Mr. Baker:

Q. What is the purpose of the use of those hatch beams; do you know from what deck they are from?

Mr. O'Neill: I am going to ask that this man be qualified as someone with real knowledge of a ship.

Mr. Baker: I will withdraw it. I will ask your ship man that question.

The Court: Unless he knows. Do you know what they use these beams for, Mr. Blaney?

The Witness: Yes, they span the opening of the hatches so that they can put hatch covers over there and to batten them down.

By Mr. Baker:

Q. Do you know which hatches they come from, as far as these beams are concerned, from what deck or hatches, if you know?

A. I assume they were from the top deck, from the top hatch.

The Court: He assumes. You see, you don't know, you assume that. You only tell us what you actually know, Mr. Blaney.

Q. Now, looking at this photograph, L-9, which is in evidence——

The Court: So that this record is straight, you objected to that answer?

Mr. O'Neill: Yes, I did.

The Court: And I sustained the objection.

[fol. 256] Q. Looking at the photograph, L-9, and looking at these tank covers, there is a round sort of lid in these tank covers. I am pointing to one, and there is one on the starboard one, and there is one on the port one. What would you call those?

A. That is a manhole cover.

Q. And what are those manhole covers used for?

A. Well, it is an access door—cover to get down into the tank.

Q. And what goes into that manhole cover?

A. The suction lines from the pump go down in there.

Q. The suction lines from the pump go into the manhole cover?

A. Yes.

Q. Now, in the normal and the ordinary loading or unloading of cargo, how is that done?

Mr. O'Neill: If he knows, if he has ever been in a port where they loaded oil cargo.

Mr. Baker: Well, we will talk about unloading.

Q. In the unloading of liquid cargo, oil.

A. The unloading, the normal——

Q. Normal.

A. The normal procedure is to have the manhole cover removed and drop the suction lines down there, as a safety.

Q. What about this hatch cover, is it opened up so as to keep the hatch open, or is it kept closed?

A. No, it is kept closed.

Q. So that only the manhole cover is opened and the pipe lines put into the hatch?

A. The suction lines, yes, from the pump.

Q. Is that the proper procedure?

A. That is the proper procedure.

Q. Is that the safer procedure?

A. That is the safest procedure.

[fol. 257] Mr. Baker: Cross examination.

Cross examination.

By Mr. O'Neill:

Q. How many ships have you been on, other than the ships you discharged oil from, cocoanut oil?

A. The exact count I couldn't say, sir.

The Court: Countless; hundreds of them, would you say?

The Witness: Well, I'd say it was in the hundreds.

The Court: In the hundreds. That is all Mr. O'Neill wants to know.

Q. Were they discharged by El Dorado or somebody else?

A. Well, that's including El Dorado, and including my working with the United Distillers.

Q. Did United Distillers import cocoanut oil?

A. We imported molasses.

Q. Well, molasses is not cocoanut oil.

The Court: He asked you about cocoanut oil.

The Witness: No.

Q. Is that right?

A. That's right.

Q. Did you discharge any cocoanut oil with United Distillers?

A. No, sir.

Q. Now, the consistency of cocoanut oil and molasses is entirely different, isn't it?

A. Yes.

Q. The same thing is true of alcohol, isn't it?

A. Yes.

Q. I will come back again—how many ships have you been on from which cocoanut oil was discharged other than those discharged under your supervision?

A. Other than those that have been under my supervision, none.

Q. Now, when this ship came in, who was in charge of [fol. 258] the plant?

A. I was.

Q. Were you there when the ship docked?

A. I was not.

Q. Who was in charge of the plant when the ship docked?

A. Mr. Sexton was in charge of the unloading of the dock.

The Court: Now, there again. Who was in charge of the plant, he asked you.

The Witness: There was no—in my capacity, there was no one there.

By Mr. O'Neill:

Q. Did you leave any instructions when you left to leave this tank covered?

A. No, sir.

Q. Did you know how deep this tank was they were going to discharge from?

A. No, sir.

Q. Well, you were the man that was charged with fulfilling this contract that you had made with somebody to discharge that ship, weren't you?

Mr. Cunningham: I object. There is no evidence of any contract in the case, your Honor.

Q. Did your company have a contract with somebody else to discharge the cocoanut oil from this ship, other than the ship itself?

A. That wasn't my responsibility. I don't know.

Q. In other words, if there was a contract, you weren't told about it, is that it?

A. That's right.

Q. Did you leave any instructions to hurry this job as much as possible?

A. I didn't.

Q. Because there might be a charge for demurrage?

A. I did not.

Q. Do you know whether or not Mr. Sexton told the men working under him to rush the job because there [fol. 259] might be a charge for demurrage?

A. I do not.

Q. Do you know whether or not your plant would have been charged with demurrage if this ship didn't get out in a certain time?

A. I do not.

Q. What was the power of this pump, how deep would it draw; by that I mean the oil—10 feet, 15 feet?

A. The pump actually, without any interruptions, could conceivably—it has done, and I have watched it perform, pump out down to 29 feet.

Q. How deep was your tank here?

The Court: Twenty-nine feet, did you say?

The Witness: Yes.

Q. What ship did you do that on?

A. Several ships.

Q. Name one, two.

A. I don't recall the names of them.

Q. Can you look at your records and tell us the ships that you pumped that deep on?

A. I could look at records, yes.

Q. Now, you also mentioned today—or qualified that answer by saying "without interruption", is that correct?

A. Yes.

Q. What do you mean by that?

A. Well, where we had a power failure, blown fuse.

Q. Anything else?

A. That's about all.

Q. In other words, if the pump stopped?

A. Yes.

Q. Now, you came down there after this pump stopped and the first thing you did was lower it down into the tank so you could continue pumping, isn't that correct?

A. That's what I done with the pump, yes.

The Court: You did that?

Mr. O'Neill: Yes.

The Witness: Well, I called the crew—I supervised [fol. 260] it.

The Court: Yes, I want to get this straight. I understood you to say that you didn't come aboard this ship until about 1:30 p.m., after the decedent had been taken out.

Mr. Cunningham: A.M.

The Court: A.M. Is that right?

The Witness: That's right.

The Court: And had you been aboard this ship at any time prior to that, that day?

The Witness: No.

The Court: Well, was this work done under your general supervision?

The Witness: That's right.

The Court: All right. Go ahead, Mr. O'Neill. I didn't know that.

By Mr. O'Neill:

Q. And as soon as this interruption occurred, do you know how far the pump was drawing at the time we had this interruption?

A. Yes.

Q. How deep was it?

A. It was approximately—I would say, and it was, 26 feet.

Q. Twenty-six feet?

A. Offhand. I can't remember precisely.

Q. How much oil was in the tank when you got there?

A. Around five to six feet.

Q. So you were over the pump's capacity when you started, weren't you, even taking your figures?

A. Possibly, yes.

Q. And you, as the general superintendent, didn't take the trouble to find out what this job required that you were [fol. 261] sending your men on, is that correct?

A. I didn't take the trouble, no.

Q. Now, when this ship arrived, and the crew opened the hatches, that's usual, isn't it, the upper deck?

A. Yes.

Q. Do you know how big that main deck was?

A. No.

Q. You had men down there then to work on the ship, did you not?

A. Yes.

Q. And did they have authority from you to lay out the method under which this oil was going to be discharged?

A. Yes.

Q. And they, of course, would be familiar with this pump, wouldn't they?

A. Yes.

Q. And this is a peculiar kind of pump because it always has some sort of leak in it, is that correct?

A. I wouldn't say it's peculiar.

Q. Well, would you say this, that this pump, no matter how it was operated, would leak in some manner?

A. Yes.

Q. And that would require a man down there at all times, is that correct?

A. Not necessarily.

Q. How much would it leak?

A. Well, it is supposed to drip.

Q. And when you get fooling around with the fittings, it may drip more or less, is that correct?

A. No.

Q. It always drips the same?

A. Always drips the same.

Q. Why would a man tighten the fittings up?

A. Why would a man tighten the fittings?

Q. Mr. Russo, if I recall his testimony correctly, testified that if you tightened up on the fittings you would slow up on the leak.

A. That's right.

Q. Well, then, isn't my question correct, then, you play [fol. 262] with the fittings to have it leak more or less?

A. Yes, if you played with them.

Q. Well, he did. Now, what would be your instructions to him, if this ordinarily leaked—at what stage of the operation of that pump should he have fooled with these fittings, or worked on them?

A. I did not give instructions to the help. My instructions were given to the supervision of the help.

Q. And who was that, Mr. Sexton?

A. Mr. Skovgaard, insofar as the mechanical end.

Q. Mr. Skovgaard wasn't there that night and you knew he wasn't going to work, didn't you?

A. His assistant was there.

Q. Well, did you give them to his assistant, or did you give them to Mr. Sexton, or to just whom did you give them?

A. That was the normal procedure, normal practice with all——

Q. What did you do this evening? You had a contract to discharge this ship, she was coming in there to discharge, and you were leaving. What instructions did you give to the men that you left there with the ship?

A. I didn't give them any specific instructions, I just asked if all the equipment was in shape. And their answers were, "Yes."

Q. And then you left it up to them to get the equipment on deck and direct the way the equipment was to be used?

A. Yes.

Q. Now, when you came down on the ship you saw the tank open, did you not?

A. I did.

Q. The manhole cover was not used?

A. It was not.

Q. Who did you instruct to take off that manhole cover before they started working on the ship?

A. I instructed nobody.

Q. But you tell the Court now that the proper and normal way to discharge the ship was to take off that manhole cover?

[fol. 263] A. That is true.

Q. Well, then, were your men doing the work improperly and contrary to your instructions?

A. They were performing their work as it was presented to them. In other words, if the cover was off they went about their work and set the pump as the ship's crew had set the cover.

Q. Well, now you are talking about the ship's crew. Isn't the ship's crew under the jurisdiction of your men at that time?

A. No.

Q. Do you know who told the ship's crew to put the tank cover in that position?

A. I do not.

Q. How do you usually get the pump from the dock to the ship?

A. That is handled—the ship's crew handles the cranes.

Q. And, of course, they handle it under the direction of your men?

A. They hoist it aboard.

Q. And your men tell them where they want it?

A. My men tell them—when it is down in the hold, they show them just where to place it because of the suction and discharge of the pump.

Q. That's it, this is a special type pump and the people that handle this pump require special knowledge, is that correct?

A. I don't know what you mean by a special pump. It is a pump that will suck and discharge.

Q. Well, let me put it this way. It is not the type of pump that you run into on any ship?

A. I have seen them before on ships.

Q. Have you ever seen a ship come into your dock, with cocoanut oil on, with a pump to discharge?

A. A ship with a pump to discharge?

[fol. 264] Q. Cocoanut oil.

A. The ship never furnished the pump.

Q. So that this pump that was used at that time was furnished by the people who are peculiarly fitted to handle this type of cargo.

You shake your head.

A. I am sorry. I was waiting for you to finish the question. Yes.

Q. So that your men, the men who would take this aboard, would be just ordinary crew members, ordinary seamen, A. B., is that correct?

A. Yes.

Q. And then this pump would have to be so placed when it was taken down on the ship so that you had a proper discharge and a proper suction connection, is that correct?

A. That is correct.

The Court: Wait just a minute. Who determines where the pump goes?

The Witness: The man in charge of the unloading of the oil from the ship.

The Court: I see. That would be an El Dorado Company employee.

The Witness: That would be an El Dorado Company employee.

The Court: The crew would put it wherever he directed?

The Witness: That's right.

The Court: Gentlemen, I think we will take a short recess, five minutes.

[Short recess.]

By Mr. O'Neill:

Q. Now, when you came down, Mr. Blaney, and you had to get this pump started again, the only way you got it [fol. 265] started was by lowering it down into the tank, is that right?

A. That is the only way I tried to get it started.

Q. It goes without saying that you couldn't get it through a manhole cover, could you?

A. No.

Mr. O'Neill: We haven't had a description of that pump, your Honor.

Q. How long is that pump, Mr. Blaney?

A. The pump, including the frame, the skid, the steel skid that it was mounted on, was around four foot long.

Q. How high?

A. Approximately 28 to 30 inches high.

Q. And how wide?

A. About two foot.

Q. Now, when you came down on the ship, where was the pump?

A. The pump was setting on——

Q. Will you look at Libellant's Exhibit 9 and tell us where the pump was, or where you saw it when you came aboard the ship?

A. The pump was setting on this cover, tank cover [indicating].

Mr. O'Neill: Have we got another colored pencil?

Mr. Watson: Blue.

Mr. O'Neill: Blue will be all right.

By Mr. O'Neill:

Q. Now, will you mark on this Libellant's Exhibit 9 where

the pump was when you came aboard the ship, where you saw it?

A. Where I saw it, it was setting approximately in this position [indicating].

Q. Would you mark it?

[Witness complies.]

A. Like this. This suction side.

Q. This is the suction side. Will you mark an "S" where the suction side is?

[fol. 266] No, that is the discharge.

A. I am sorry.

Q. Put a "D" for discharge.

A. Now, that is suction there. This is "D" for discharge.

Q. And how far to starboard did that pump extend, this being starboard, "std"?

A. It extended on to the plate here.

Mr. Baker: You say "onto the plate"—he means the port plate.

The Witness: That's right, this plate, the port.

By Mr. O'Neill:

Q. While you are marking it out there, will you mark it out, please, Mr. Blaney?

[Witness complies.]

Q. And where was this port tank cover when you came aboard the ship?

A. Approximately the same position as this cover is, swung over like this.

Mr. Baker: You are referring now to the port tank cover.

The Witness: Yes, I am.

Q. When you say "approximately" do you mean by that that it was resting with, let's say, this little opening between the two tank covers there?

A. I'd say it was resting about in this position here, like this.

Q. In other words, it overlapped on to the starboard tank cover, is that correct?

A. Yes.

Q. Now, this suction line that we are talking about, how did that get ashore?

A. How did the suction line——

Q. Yes.

A. That's the discharge line.

Q. The discharge line. I am sorry.

A. The discharge line was connected to the pump, going [fol. 267] up over here, your coaming, up over there. Now, that was strung across the deck and down onto the pier.

Q. Now, did that rest right on the coaming or was it on what you would call a saddle?

A. On a saddle, as I recall, yes.

Q. And that saddle is a piece of wood that you put the hose on and it is attached to the boom on the ship, is that correct?

A. That's correct.

Q. Was the suction line in oil when you got aboard?

A. The suction line was in oil, yes.

Q. And about what time did you get aboard?

A. Around 1:35, in that vicinity, 10 or 15 minutes more or less.

Q. The body hadn't been removed yet?

A. The body had been removed, yes.

Q. You think that was about 1:35?

A. I would say yes.

Mr. O'Neill: I think that is all.

The Court: Mr. Cunningham.

Mr. Baker: May I have permission to ask him——

Mr. Cunningham: My permission?

Mr. Baker: Yes.

Mr. Cunningham: Yes, you may have my permission.

Mr. Baker: I have some questions on redirect that I would like to ask him. Although you can cross examine now.

The Court: Let him cross examine, then if you have any redirect you can do it then.

Cross examination.

By Mr. Cunningham:

Q. Mr. Blaney, by whom are you employed now?

A. Diamond Expansion Bolt Company, Garwood, New Jersey.

Q. And will you tell us briefly your educational background, sir?

A. I have a formal education in engineering, a Master's [fol. 268] Degree.

Q. From what university?

A. Massachusetts Institute of Technology.

Q. What time did you leave the plant on December 5, 1952?

A. It was my normal procedure to leave around five, which it must have been at that time.

Q. About 5:00 p.m.?

A. 5:00 p.m.

Q. And as far as you recollect, you left at your normal time that night?

A. That is true.

Q. Now, would you tell us, please, in the normal procedure, when an El Dorado pump was put on a ship—and I now refer to Libellant's Exhibit L-9—who determines whether or not a tank lid, such as is shown in this photograph, is taken off the tank or is left on the tank?

A. That is the——

Mr. O'Neill: I am going to object because he said he didn't give any orders to anybody. You mean in this particular case?

Mr. Cunningham: No, he wasn't there. I said, "What is the normal practice?"

Mr. O'Neill: All right.

The Court: He can give us the normal practice.

By Mr. Cunningham:

Q. Will you tell us, please, what the normal practice is with regard to the removal or the non-removal of a tank top such as is shown in Libellant's Exhibit L-9? And I refer particularly, of course, to the port tank top.

A. The ship's crew determines the taking off and the positioning of it.

Q. Now, when the pump is taken from the shore to put on the ship, who directs the placement of the pump?

[fol. 269] A. The El Dorado employees direct the placement of the pump.

Q. And their direction is dependent on where the tank lids have been placed by the ship's crew, is that correct?

Mr. O'Neill: I am going to object to that. I don't see how it binds us, what may have been done when this man was in charge of the job. There is another man here whose superintendent was in charge of this particular job. Now we are getting testimony that may include something that happened pumping out the hold—molasses. Now, I think the man that actually handled this situation should be here to testify about the placing of this tank lid and what the crew did in this particular instance. I don't think this man is qualified to testify to that, sir.

The Court: What was the question put to him?

[Question read.]

Mr. Cunningham: Let me rephrase the question.

Q. You have told us, Mr. Blaney, the determination of where the pump is placed is determined by the El Dorado personnel?

A. That's right.

Q. Now, their determination is dependent upon, of course, whether or not the tank lid has been taken off by the crew as to where the pump will be placed, isn't that correct?

A. That is correct.

Mr. O'Neill: He is asking for the operation of somebody else's mind. There are a number of places this could have been placed. You don't have to take a tank cover off to place the pump. You could place it on the tank cover over there.

Mr. Cunningham: I don't know what the objection is.

Mr. O'Neill: My objection to the question is this. You [fol. 270] are asking for the determination of somebody

else's mind, as to what they do. Now, I don't think this man is qualified to testify to what they may do.

Mr. Cunningham: This is testimony as to normal practice which is similar to the testimony that you got as to what the normal practice is. I think you opened the door as to what normal practice is, and this man has testified on your behalf as to what normal practice is. Certainly he may testify in my behalf as to what normal practice is.

The Court: Yes, he may. I so rule.

Do you understand that question, Mr. Blaney?

The Witness: I think I do. Yes.

The Court: Answer it.

The Witness: May I have the question repeated again, to make sure.

[Record read.]

A. It is.

The Court: Wait a minute. Let me get this straight. Assuming the members of this crew took that tank lid and put it way down at the end, leaving, for example, three-quarters of that tank exposed, would you instruct your men to put that pump on that little portion?

The Witness: No. No, it is determined—if the tank cover itself were placed way over, naturally it wouldn't be a proper place to put it.

The Court: Then there could be a legitimate objection, and to say, "That is a dangerous place," isn't that right?

The Witness: That's right.

The Court: Then your answer is, "Subject to the rule [fol. 271] of reason," is that right?

The Witness: That's right.

By Mr. Cunningham:

Q. Mr. Blaney, if the tank cover had not been placed crosswise, as is indicated in Libellant's Exhibit L-9—and I refer to the port tank cover—if it had not been placed crosswise, but had been left on, would it be possible for the El Dorado personnel to put their pump on the port cover and place the suction line through the manhole?

A. Yes.

The Court: Well, there is no doubt about that. That's the most obvious answer a man can give.

Mr. Cunningham: Well, that was the point of the question.

The Court: Yes. I mean, that is obviously so.

By Mr. Cunningham:

Q. Now, would you tell us whether or not you can recall whether the pump used in this operation was examined prior to the time it was put aboard the Tungus?

A. Yes.

Q. Now, would you tell us, please, who in the El Dorado plant had charge of examining pumps such as this?

A. Mr. Skovgaard.

Q. And what was his job, what was the category of his job, what would you call him in the plant?

A. His title was a maintenance foreman.

Q. And do you yourself remember, sir, whether or not an inspection was made of this pump before it was put on the "MV" Tungus on December 5?

A. Yes.

Q. Would you tell us, please, what you can recall concerning the incident of the inspection of this pump?

[fol. 272] A. Yes. That morning I contacted Mr. Skovgaard by phone up in his office, which is apart from mine, and told him that a ship was due in, and we were to discharge cocoanut oil, and if he were aware of the fact. And he said yes. And I asked him if the equipment was being——

Mr. O'Neill: I don't think any of this is binding on me, what he may have said to Mr. Skovgaard.

The Court: Is it?

Mr. Cunningham: I think Mr. O'Neill's objection is correct.

By Mr. Cunningham:

Q. Would you please tell us only, sir, what you can remember that you did, or that you saw, or heard, concerning the inspection of this pump, not what someone else told you concerning the inspection.

The Court: You can tell us what you did as a result of what Skovgaard told you, but you can't tell us what he said, for obvious reasons.

A. Well, in going around on tour in the plant, the pump was being repaired by the maintenance machinist, and was being checked by the maintenance machinist. That I saw myself.

Q. Was that Mr. Sampson, sir?

A. No, sir; that was our maintenance machinist, who was Mr. Wagner.

Q. Go on.

A. He is under Mr. Skovgaard's—was under Mr. Skovgaard's jurisdiction.

Around 4 o'clock, on my plant tour, before leaving, I walked out on the pier, the pump was placed on the string piece, ready and waiting for the ship to come in. I talked with one of the fellows—well, Mr. Skovgaard—and asked him if everything was in readiness, and he said yes. That's all.

[fol. 273] Q. What did you understand from the practice in your trade of the answer "yes" to the question, "Was everything in readiness," what did that mean to you?

A. That the pump was in good working order.

Q. Now, sir, as a result of your education, and as a result of your experience in the use of pumps, can you tell us whether a pump of this kind, if it is operating normally, and is in perfect operating order, leaks slightly from the gland?

A. Yes, it does——

Mr. O'Neill: I object to that as leading.

Mr. Cunningham: Cross examination.

Mr. O'Neill: Not about a slight leak.

The Court: Well, you told him it was leaking and where it was leaking from. That is what Mr. O'Neill objects to.

Mr. Cunningham: I see.

The Court: Yes. You told him where you wanted it to leak, from the gland.

Mr. Cunningham: Well, that is what we are talking about in the case.

The Court: There is no doubt he knows the answer. You are a graduate of MIT?

The Witness: Yes, sir.

By Mr. Cunningham:

Q. Now, would you tell us why, sir, in theory, it is necessary for a pump to leak from the glands during normal perfect operation?

A. The theory is that packing which surrounds the shaft of the pump is retained—you have a packing retainer which can be drawn up, and the tighter you draw it up the tighter the packing squeezes against the shaft, causing excess friction, which, in turn, causes excess heat and it will burn out your packing, which defeats the purpose of a seal. [fol. 274] Therefore, you keep a little leak coming through to keep the packing lubricated, and keep it cool, and keep the shaft cool, because the shaft, in turn, will score, if you pull it up too tight.

Q. Score?

A. Ridges will burn in it, and so forth.

Q. So that, therefore, in order for the pump to operate properly you must have a little leak in this area from the gland, is that right?

A. Yes.

Mr. Cunningham: No further questions.

Cross examination [Continued].

By Mr. O'Neill:

Q. How old was this pump?

A. This pump was purchased in—it was two years old, two years and four months, something like that.

Q. And before it was used it was always checked?

A. That is correct.

Q. Now, in tightening up on this gland that we heard about, you would tighten up on that gland, as I understand your testimony, from the packing, because the packing might get a little bit too loose and permit what might be considered an excessive leak, is that correct?

A. That is correct.

Q. Now, did you know that this pump went on fire that night?

A. I do not know it, no.

Q. And it shouldn't have gone on fire if it was operating in this normal condition we talked about, should it?

A. That's true.

Mr. O'Neill: That is all.

Redirect examination.

By Mr. Baker:

Q. Mr. Blaney, since the death of Mr. Skovgaard, the work that he was doing, has there been a change in the [fol. 275] wages of the man in that category, in that job?

A. Yes.

Mr. O'Neill: Well, sir, I am going to object. He said he doesn't work there any more. Am I correct in that?

Mr. Cunningham: He is now employed by someone else. Is that so?

The Witness: That's true.

Mr. Cunningham: How long were you employed by El Dorado after this accident?

The Witness: About a year and a half.

By Mr. Baker:

Q. All right. Now, the answer to the question.

The Court: You must know this of your own knowledge.

The Witness: Yes. May I have that question again?

[Question read.]

A. There was a wage change, yes.

Q. And was it an increase or a decrease?

A. It was an increase.

Q. And what was the increase?

A. The increase was 18 cents an hour.

Q. Eighteen cents an hour?

A. That was right up until my termination of employment with El Dorado.

Q. And the wage scale of a man in the position of Mr. Skovgaard, what would that run a week, approximately, on the work?

The Court: Wait. You can get that from the records.

Mr. O'Neill: I am going to object to that. This very case shows that if you have a ship in, they work extra time; if they don't have a ship in, they work eight to five.

The Court: Is it a forty-hour normal work week?

The Witness: It is a forty-hour normal work week; time [fol. 276] and a half for overtime, yes.

By Mr. Baker:

Q. Would that mean that he would also get overtime in normal work?

Mr. O'Neill: I object. He couldn't get overtime in normal work, because normal work is 40 hours a week.

The Court: I assume that overtime is overtime. If you work over 40 hours a week, you get paid, or over eight hours a day you get paid.

The Witness: That's what I wanted to interject, over eight hours you do get time and a half.

The Court: Time and a half over eight hours in one day.

By Mr. Baker:

Q. And during that period of a year and a half was there overtime work that Mr. Skovgaard might have done?

A. Yes, there was.

Q. There was?

A. Yes.

Q. Could you approximate how much a week he would be earning during that period of a year and a half after his death with the increase, with the overtime wages—how much of an increase would it be a week?

The Court: It would be 18 time 40 over what he got before that.

Mr. Baker: I am asking also including possible overtime.

The Court: Wouldn't that be a speculation, the overtime?

Mr. O'Neill: Sure.

[fol. 277] The Court: You could probably show it over a period of years, that he averaged so many hours overtime per year. That is the best standard by which we could judge it.

By Mr. Baker:

Q. Who took Mr. Skovgaard's position after his death?

A. Mr. Donohue.

Q. On this photograph would you mark with this blue pencil this cover which we called—this manhole cover that you pointed out before.

The Court: It is quite apparent if you look at the picture closely.

A. At this point here [indicating].

Q. Put an "M" there, "M" for manhole.

[Witness complies.]

Mr. Baker: That is all.

The Court: Mr. Blaney, this normal leakage that you speak of from the glands, is that usually caught in some kind of receptacle?

The Witness: Yes. We always had a bucket, about an eight-quart bucket.

The Court: An eight-quart bucket?

The Witness: Yes.

Recross examination.

By Mr. O'Neill:

Q. And if there wasn't a man there all the time, and if we had the excessive leak which is indicated by the repairs that were made here, that bucket would very easily overflow, would it not?

Mr. Cunningham: I object to the use of the words "excessive leak". I think Mr. O'Neill is concluding that himself.

Mr. O'Neill: I will reframe the question.

[fol. 278] Q. With the normal leak, a man who was down taking care of the pump wouldn't touch it, he would just take a look at it, is that correct?

A. Yes.

Q. And if he went in and tightened the jacket around the gland, would that indicate to you that there was more than a normal leak?

A. If he had to, yes, it would be an indication of——

Q. And if you had more than the normal leak it wouldn't take very long to fill this bucket we have been talking about, would it?

Mr. Cunningham: I object to that, if your Honor please.

The Court: Too speculative?

Mr. Cunningham: What is more than a normal leak?

Mr. O'Neill: Well, I will ask him. He is an expert.

The Court: Yes. I don't know how he can answer that question.

Mr. Cunningham: Is that question withdrawn?

Mr. O'Neill: Withdrawn.

By Mr. O'Neill:

Q. When would you consider it necessary to tighten up on the gland we are talking about?

Mr. Cunningham: May I have the question read?

[Question read.]

A. Normal leakage on the pump we consider is drip. And when it becomes faster than a drip we consider that it is time to take up slightly on the gland till you get the drip again.

Q. That wouldn't be enough ordinarily to cause friction enough for the pump to go on fire, would it?

A. No.

Q. Would that, in your opinion as an expert, indicate here that it was quite a bit more than a drip?

[fol. 279] Mr. Cunningham: I object to that.

The Court: If what, if it went on fire?

Mr. O'Neill: No, when he tightened it up that tight. I will withdraw it.

Mr. Cunningham: I object to the question for several reasons.

The Court: He withdrew it.

By Mr. O'Neill:

Q. Did you give any instructions, Mr. Blaney, to have a man at that pump at all times while it was in the hold of the ship?

A. I did not.

The Court: Don't they usually have a man standing by while the pump is operating?

The Witness: We have what we call a standby man, yes, which was Mr. Russo and Mr.—I forget his name now.

The Court: You never leave the pump unattended while it is being operated, do you?

The Witness: What they do, your Honor, is they inspect the pump, see if everything is normal, and then they come up topside and check the oil lines, to see that the oil lines aren't leaking, which takes them off board, and they are continuously going around, like a watchman.

The Court: I see. Anything further from Mr. Blaney?

Mr. O'Neill: I have nothing further.

Mr. Cunningham: Mr. Blaney is excused as far as the respondent-impleaded is concerned.

The Court: That is all, Mr. Blaney.

[Witness excused.]

COLLOQUY

Mr. Baker: I would like at this time permission of the [fol. 280] Court to read some extracts from a deposition of the respondent, by its Captain, Olav Nilsen, which was taken June 27, 1955.

The Court: Isn't Captain Nilsen available?

Mr. O'Neill: No.

Mr. Watson: He is in Norway.

Mr. O'Neill: I might say to your Honor at this time that the Captain testified to certain things, but he did not know about the accident until the following morning.

Mr. Baker: I will furnish this to the Court.

The Court: I should have it.

Mr. Baker: And I request the Court to file the original of that deposition.

The Court: We are supposed to have that.

Mr. Baker: On page 9:

"Question: After the vessel docked at Bayonne, New Jersey, were preparations made by you or your officers or crew for the discharge of this tank?

"Answer: Yes. The ship's crew lifted the lid and placed it across the top of the tank."

Page 66. "Question: Is there any indication in the log informing us or informing anyone as to who lifted the port lid?

"Answer: The crew did."

Mr. O'Neill: Well, if your Honor please, my objection is that the Captain is reading from the log and I want it understood at all times that the Captain was not there.

The Court: Is that so, Mr. Baker?

Mr. Watson: It is right on page 9.

Mr. Baker: It says in the question, "Is there any indica- [fol. 281] tion in the ship's log." It says so right in the question.

The Court: I see.

Mr. Baker: Counsel has directed to my attention that on page 9——

The Court: I read it already.

Mr. Baker: —that he was not present when it was done.

That is all. And the libellant rests at the present time.

The Libellant Rested.

Mr. O'Neill: Being an admiralty case, Judge, we can't do much in the way of motions.

The Court: That's right.

[Remarks off the record.]

Mr. O'Neill: If your Honor please, may Mr. Watson read the parts of the compensation record which we think are pertinent in this case?

Mr. Baker: If your Honor please, I am objecting to any compensation in the case. Your Honor is sitting as a trial judge and jury.

Of course, I have no objection to placing into evidence the amount of compensation that has been paid, being that it is not going to be prejudicial to your Honor, sitting as a jury, because your Honor knows that compensation is paid in these cases.

The Court: I certainly do.

Mr. Baker: And I think that is all that is relevant, the amount—that they did pay compensation and how much.

Mr. Cunningham: Perhaps I should be heard here, because I am going to ask for a stipulation during my time [fol. 282] at bat that compensation has actually been paid, and that it has actually been paid under the New Jersey State Compensation Act. Of course, that is one of my defenses. And I understand from both of my colleagues that they will stipulate to that.

Now, as to whether any portion of the record is competent as evidence in this case, I am not committing myself now.

The Court: Well, I don't know what the purpose of the proffer is. Up until now all I know is their compensation rates. What he expects to prove from it, I don't know yet.

Mr. Watson: We want to submit in evidence, your Honor, the determination award and rule for judgment of the New Jersey Department of Labor and Industry, Division of Workmen's Compensation.

Mr. Baker: May I ask for what purpose?

The Court: You mean you are going further than to just prove how much they received?

Mr. Watson: I think that is pertinent.

Well, there is a holding, your Honor, in the determination as to the status of the decedent, and that was—there was a controversy here as to whether the New Jersey Department of Labor and Industry had jurisdiction, and the determination——

Mr. Baker: I object to the determination of the compensation court. How would that bind this court?

Mr. Watson: Because the libellant was represented at that controversy, as was the controverting party, El Dorado Oil Works, and the determination was made that the Longshoremen and Harbor Workers' Compensation Act was inapplicable because the decedent was not a ship's worker, [fol. 283] and that the New Jersey Compensation Act was the proper Act under which any award was to be made.

Now, that is set forth in the determination award and rule for judgment, which we want to submit into evidence.

The Court: You mean as a result of which now this woman would be foreclosed from a right of action here?

Mr. Watson: I am not saying that she is foreclosed as a result of the award, no, your Honor. This award was made under the New Jersey Compensation Act and I understand that an award under that Act does not assign the cause of action as it does under the Longshoremen and Harbor Workers' Act. But I think that the determination on the controverted proceeding has relevancy as to the status of the deceased at the time he met his death. That was the controversy which was raised between the libellant here and El Dorado Oil Works.

The Court: Now, do you think that I am bound by any finding made there?

Mr. Watson: I am not claiming at this time that you are bound, your Honor. I think it is relevant as one of the factors.

The Court: I will allow it for whatever it is worth.

Mr. Baker: May I have an objection to it?

The Court: You heard what I said, I will allow it for whatever it is worth. That means it may be worth nothing when I get through.

Mr. Cunningham: May I put myself on the record as objecting to it, your Honor—I don't want error; if there is any, I want to be objecting to it.

The Court: All right. You want to object, too, Mr. [fol. 284] Baker?

Mr. Baker: I am objecting to it as being entirely immaterial and improper.

Mr. O'Neill: Well, your Honor, I say this about it. If the others feel there is going to be error about it, why put it in?

The Court: Very good. Do you withdraw the offer?

Mr. O'Neill: Yes.

The Court: That settles that.

Mr. O'Neill: May I talk to Mr. Cunningham just a moment, sir?

The Court: Yes, sir.

[Consultation at counsel table.]

Mr. O'Neill: Your Honor, I have a witness to put on, but I don't like to get into the meat of the case over the weekend, and since we are going to adjourn at one o'clock I don't think anything would be served in just a half hour, we would all be going over it again Monday morning. We can put him on fresh Monday morning and get him on and get him off.

The Court: All right. I have no objection to that course of procedure. You don't have a short one, do you, Mr. O'Neill?

Mr. O'Neill: No, I don't.

The Court: They are all lengthy?

Mr. O'Neill: Well, I don't say that they are lengthy.

The Court: They would take more than a half hour?

Mr. O'Neill: Oh, yes.

The Court: All right. Then we will adjourn now and meet Monday morning at 10:15 o'clock. All witnesses under [fol. 285] subpoena will return Monday morning at 10:15. As I indicated to counsel, the Court has other judicial duties to attend to this afternoon.

[Whereupon, the hearing was adjourned to be resumed Monday, November 7, 1955, at 10:15 a.m.]

Newark, N. J.

Trial resumed pursuant to adjournment—November 7, 1955

[Appearances as previously noted.]

The Court: What point had we reached, the respondent's case?

Mr. O'Neill: The respondent's case.

Mr. Mallett, will you take the stand, please?

JOHN MALLETT, called and sworn by the respondent, testified as follows:

The Clerk: May we have your full name, please, sir?

The Witness: John Mallett, M-A-L-L-E-T-T.

The Clerk: And your address for the record?

The Witness: No. 3 Ford Court, Bergenfield, New Jersey.

The Court: Mr. Mallett, you have to speak up. It is a very large courtroom. Keep your voice up, please.

Direct examination.

By Mr. O'Neill:

[fol. 286] Q. Mr. Mallett, what is your business?

A. I am a cargo surveyor.

Q. And before that did you spend some time at sea?

A. Yes, sir.

Q. By whom are you employed at the present time?

A. W. G. Cocks & Company.

Q. And on December 5, 1952, did you have any business aboard the S.S. Tungus?

A. Yes, sir.

Q. And where did you meet the vessel?

A. At Pier 3, Constable Hook, Bayonne.

Q. And was the vessel in when you got to Pier 3?

A. No, she was just coming alongside when I got there.

Q. When the vessel arrived, and you went aboard, what was the purpose of your going aboard?

A. In order to take measurements, samples, and take temperatures, and note general conditions concerning the cocoanut oil.

Q. And how do you do that?

A. We take measurements usually from the tank lid down to the oil level. And then we take the temperature of the oil, and we draw samples from it.

Mr. O'Neill: If your Honor please, this is a duplicate of Libellant's Exhibit 9. Respondent will offer it as our first Exhibit.

Mr. Baker: May I suggest that it be marked with a different marking?

Mr. O'Neill: I did do that.

The Court: That is why he is offering it.

The Clerk: The picture will be marked R-2.

[Received and marked Exhibit R-2.]

By Mr. O'Neill:

[fol. 287] Q. Now, Mr. Mallett, I show you this photograph, Respondent's Exhibit R-2, and ask you if you will point out—let me ask you this first. Do you do anything before the tank cover is removed?

A. In this case we took measurements through these four—what they call ullage holes in the tank lid.

The Court: Not manholes, then?

The Witness: No, sir.

The Court: Ullage holes.

By Mr. O'Neill:

Q. Would you mark those, please, with a "U"?

[Witness complies.]

Q. And what does this "ullage" mean, Mr. Mallett?

A. It is a nautical term as opposed to "innage". Innage is the actual depth of the oil and the ullage is the difference between—measured from somewhere above it to the surface of the oil.

Q. And in this case that would be from the tank top down to the oil in the tank, is that correct?

A. From the tank lid, yes.

Q. And that was done before this tank top was taken off, is that correct?

A. That's right.

Q. Were you there when they took off the tank top?

A. Yes, sir.

Q. Did you have anything to do with the oil after this tank top was removed?

A. When they removed the tank lid we took the temperature of the oil, and also samples.

Q. Now, this tank lid, how is that removed—by that I mean just how do they take that off the tank itself?

A. They remove the bolts around the tank lid, and the lid was slung on a bridle from these ring bolts here, and lifted by means of the ship's winch.

[fol. 288] Q. And was it placed in that position as shown in that photograph, Respondent's Exhibit 2?

A. Yes, sir.

Q. Now, when you went aboard this ship was there anybody from El Dorado that you—or before you went aboard the ship at any time did you have a conversation with anybody from El Dorado?

A. Yes, sir.

Q. And who was the person with whom you spoke?

A. I met a Mr. Sexton.

Q. And where did you first meet Mr. Sexton?

A. I believe it was on deck, on the starboard side here.

Q. Do you know what Mr. Sexton's position was?

A. I believe he was in charge of the operation of discharging the oil for El Dorado.

Mr. Cunningham: I object to the answer unless Mr. Mallett can testify definitely, not as to what he believes. I move to strike it.

The Court: Do you know, as a matter of fact, that he was in charge, sir?

The Witness: I have pumped oil over there before, sir, and we usually dealt with Mr. Sexton, and he appeared to be in charge of the operation.

The Court: You mean he acted like the man in charge of the operation?

The Witness: Yes.

The Court: Was he giving orders and suggestions?

The Witness: Yes, sir.

The Court: I will allow it.

By Mr. O'Neill:

[fol. 289] Q. In placing this tank top in position, who placed that in position, the position as shown on that photograph?

A. There were two of the ship's crew driving the winches, and members of the El Dorado pumping gang—I believe it was they, it didn't look like the ship's crew—handled the lid as it came up and placed it in position.

Mr. Cunningham: I object to that portion of the testimony in which he says "he believes" it was El Dorado men because they didn't look like ship's crew, on the grounds that it is a conclusion of the witness and not of his own knowledge. I move to strike out that portion of his answer.

The Court: You have to know, Mr. Mallett.

The Witness: Yes.

The Court: Were they members of the El Dorado crew or were they members of the ship's crew?

The Witness: I don't know definitely.

The Court: You don't know. But you do know they were not members of the ship's crew, is that right?

The Witness: Not definitely; no, sir.

The Court: You don't know it. All right.

The objection is well taken, Mr. Cunningham.

By Mr. O'Neill:

Q. Was there anybody down there from El Dorado directing the placing of this tank cover?

A. Will you repeat that, sir?

Mr. O'Neill: Will you read the question.

[Question read.]

Mr. Cunningham: If your Honor please, I object to the question. The question asks for the direction—whether somebody directed it. I observe that that is a conclusion [fol. 290] which Mr. O'Neill is asking this witness to draw.

Mr. O'Neill: I will withdraw it.

Q. Was there anybody down there directing where this tank lid was to be placed?

A. Yes, sir.

Q. Who was the person who was doing that, if you know?

A. Mr. Sexton was giving orders.

Q. And after this tank lid was placed in position did you have any conversation with Mr. Sexton about the placing of the pump?

A. Yes, sir.

Q. What was that conversation?

A. My suggestion was that the tank lid be removed entirely and the pump placed on the deck.

Q. And in placing the pump on the deck, what would be the purpose of that?

A. The pump would be three feet lower, therefore it would be easier to pump the oil.

Q. And what did Mr. Sexton do as a result of that suggestion, if anything?

A. He ignored it. He said that he was—to the best of my recollection, he said he was doing the job his way, and that is the way it was being done.

Mr. Cunningham: If your Honor please, I wish to note the objection of the respondent-impleaded to the testimony of Mr. Mallett as to what Mr. Sexton said, since it hasn't been shown that Mr. Sexton was the managing agent of the El Dorado, of the respondent-impleaded, and therefore his statement would not be binding upon El Dorado.

The Court: Just a minute. This man said he gave every appearance and every indication that he was the man directing the operation, and that he knows Mr. Sexton, and that Mr. Sexton has done it for years, is that right?

[fol. 291] The Witness: That's right, sir.

The Court: He doesn't have to have a badge on, does he, Mr. Cunningham?

Mr. Cunningham: Beg your pardon?

The Court: You don't contend that Mr. Sexton needs a badge on, do you?

Mr. Cunningham: No, sir; I didn't hear the testimony that he had done it for years—that this man knew he had directed it for years. If that is the testimony, I will withdraw the objection.

The Court: Didn't you say you had seen him do it many times?

The Witness: Yes, sir.

By Mr. O'Neill:

Q. Now, then, you say the pump was brought aboard?

A. Yes, sir.

Q. And do you know where the pump was placed on the tank top?

A. It was placed on the tank top here [indicating].

Q. Now, did you, after this accident occurred, make a memorandum showing the position of the pump and the hoses at the time of the accident?

A. Yes, sir.

Q. Have you got that memorandum with you?

A. I have.

Q. May I see it?

[Document handed to counsel.]

Mr. O'Neill: I will offer that memorandum in evidence, sir.

[Document handed to counsel.]

Mr. Cunningham: Mr. Baker, do you take any objection to this memorandum?

[fol. 292] The Court: He didn't want to look at it. He said to show it to you.

[Consultation between counsel.]

Mr. Cunningham: I am going to object to it, your Honor, if it is self-serving of what this witness is going to testify to. I don't mind it being marked for identification at the moment. Perhaps some time later if will be apt to offer it in evidence, but at this moment I think it is incorrectly offered.

The Court: Will you mark it for identification, Mr. O'Neill?

Mr. O'Neill: Yes, sir.

The Clerk: It will be marked R-3 for identification.

[Marked Exhibit R-3 for identification.]

By Mr. O'Neill:

Q. Now, Mr. Mallett, will you mark on Respondent's Exhibit R-2 where the pump was placed before the pumping operations were begun?

A. This is facing us?

Q. That's right.

The Court: Why don't we mark this one like the other?

Mr. O'Neill: Yes.

Q. Will you mark that "aft"?

A. This is aft, and this is the starboard side, and this will be the port side. [Marking Exhibit.]

Q. And this is port?

A. This is port.

The Court: Now they agree.

By Mr. O'Neill:

Q. Will you mark, Mr. Mallett, on that Exhibit—that is where the pump was placed.

A. And the discharging line came around like this and down the tank there.

[fol. 293] Q. The suction line.

A. The suction line, yes.

The Court: Hold it a minute. He places the pump on the port side tank cover, aft.

The Witness: Yes, sir.

Q. And about how far back from this forward—the aft of the tank lid was the front of the pump?

A. Twenty-eight inches.

Q. Then your discharge line came out and ran towards the port side—I mean the suction line.

A. The suction line ran towards the port side and down the tank there.

Q. Now, would you mark that suction line with an "S", please?

A. [Witness marks photograph.]

Q. And where did your discharge line go?

A. The discharge line came across here and up—which side of that it went I am not quite sure. I believe it went on this side here.

Mr. Cunningham: Indicating the forward side of the ladder.

The Witness: Yes, I believe. I can't recall at this date, but it was somewhere around the ladder, anyway.

Mr. Cunningham: That is your best recollection.

The Witness: Yes.

By Mr. O'Neill:

Q. And is that the position the tank lid was in?

A. Yes, sir.

Q. And you were aboard the ship when this photograph was taken, and you directed the placing of the tank lid, did you not?

A. Yes, sir.

Q. And does that reconstruct conditions as they were at the time of the accident?

A. It does.

[fol. 294] The Court: Now, up until this point, as I recall, the testimony has been that the port tank cover was over on the starboard tank cover.

Mr. O'Neill: That's right.

The Court: And this man says no.

Mr. O'Neill: That's right.

The Witness: If I could have my drawings I could explain something.

The Court: Don't explain anything. Wait till they cross examine you, they will give you plenty to explain.

By Mr. O'Neill:

Q. Now, as a surveyor aboard these ships do you prepare a record, for your office records, of just what you found?

A. Yes, sir.

Q. And this R-3 for identification, is that one of the memorandums prepared by you in the regular course of business?

A. Yes, sir.

Mr. O'Neill: I will now offer it in evidence.

The Court: Mr. Cunningham, no objection now?

Mr. Cunningham: No objection now, your Honor.

The Court: Mr. Baker?

Mr. Baker: I am objecting on the grounds that it is self-serving. If he has already testified, we don't need any memorandum to add into it.

The Court: Do you know the Business Record Rule?

Mr. Baker: I certainly do. I have used it.

The Court: The objection is overruled.

The Clerk: R-3, formerly marked for identification, marked in evidence.

[fol. 295] [Received and marked Exhibit R-3]

The Court: If they ever permitted that objection, that they are self-serving, you would never get them in.

By Mr. O'Neill:

Q. I show you this paper and ask you whether or not that is a record which you made in the regular course of business, after attending aboard the S.S. Tungus?

A. Yes. This is a copy of our report to our principal, the Barber Line, concerning the discharge of the cocoanut oil.

Mr. O'Neill: I will offer that in evidence.
Mr. Cunningham: No objection.
Mr. Baker: No objection.
The Court: It may be marked.
The Clerk: That will be marked R-4 in evidence.

[Received and marked Exhibit R-4.]

By Mr. O'Neill:

Q. Now, Mr. Mallett, what time did you finish your duties down in the hold there after the vessel came in; by that I mean—it came in, I think your record shows, and I think we can agree it came in about 6 o'clock—does your record show what time you started to pump?

A. Yes.

Q. And what time did you leave the hold after the pump started?

A. We left the hold before the pump started actually, when we finished taking the measurements, and the samples, and then I had to go down to the engine room to examine the tank bulkheads and inspect the steam return line. And then I came out on deck again and hung around till they started pumping.

Q. And about what time was that?

A. About 8 o'clock, I believe. I think it is in here. Can I refer to this?

[fol. 296] Q. Yes.

The Court: Yes, you may.

A. Yes, 8 o'clock.

Q. Now, was there any reason for you staying aboard the vessel this night?

A. Only the fact that it was so far away from every-

thing. Quite often on these jobs we leave the ship and come back towards the end of the pumping to see how much oil is left in the tanks when they finish pumping.

Q. So that you have to be there, do you not, when this pumping is finished, as a surveyor?

A. Yes.

Q. You stayed aboard this night?

A. Yes, sir.

Q. And were you there the following morning?

A. Yes, sir.

Q. When they recommenced pumping?

A. Yes, sir.

Q. And your record shows that, does it?

A. Yes, sir.

Q. Now, Mr. Mallett, how long have you been engaged as a surveyor?

A. Since 1948.

Q. And how many cargoes of oil have you surveyed in that time approximately?

A. I should imagine at least once a month.

Q. And would that be cocoanut oil?

A. Cocoanut oil, palm oil, most kinds of oil.

Q. And how many times had you been at El Dorado before the date of the accident—that is, their plant?

A. I should imagine five or six times.

Q. Now, did you ever see cocoanut oil discharged through the manhole cover?

A. No.

Q. Is there any objection—let me ask you this first. You are familiar with the types of pumps that are used around [fol. 297] oil, are you not, in the New York harbor?

A. Yes, sir.

Q. And were you familiar with the type of pump that was used in this operation?

A. It is the only type I have seen. They are usually steam pumps.

Q. In other words, when you say it is the only type you have seen, you mean usually the people discharging use steam rather than electric, as this pump was, is that it?

A. That's right.

Q. And would you have any idea of the power of this pump that they used?

A. I had seen them discharging oil at El Dorado before and the impression I got was that this pump was not so powerful as a steam pump.

Q. And it wasn't a pump that would go to the depth of the tank that we have here—all right. Cross it out.

When you were down there, as you say, taking measurements, ullages, and that sort of thing, did you have any difficulty while you were down there reading?

A. No, sir.

Q. How do you do that, do you make a record as you go along, or do you have to read instruments, or just what do you do?

A. We dip a carpenter's ruler usually through these holes into the oil.

Q. And then after you do that, you have to read that ruler?

A. You have to read it, yes.

Q. Did you have any difficulty down in the hold of this ship doing that?

A. No.

Q. When, after they started pumping, around 8 o'clock, was your attention next attracted to something in No. 3 hold?

A. When, did you say, sir?

Q. Yes, when.

A. About quarter to 12, I believe.

[fol. 298] Q. What happened?

A. The Third Officer reported that there was some oil leaking from the pump.

Q. Did you make a record of that?

A. No, I came out on deck to just note what was happening.

Q. And you say there was a leak there at that time?

A. Yes, sir.

Q. Much of a leak?

A. At that time, no.

Q. And later on did you come out again?

A. Yes, sir.

Q. And what was the reason for that?

A. From where the leak had been before oil was now spurting at a great rate.

Q. And did that concern you, as the surveyor of this oil?

A. Yes.

Q. In what way?

A. We might have to estimate how much was lost; and also I look after the Barber Lines' cargo interest; and I was concerned with examining what cargo had been damaged, if any.

Q. And was there much oil lost as a result of this spurt that you tell us about?

A. There was quite a lot of oil around the 'tween decks.

Q. You mean the 'tween deck or the shelter deck? We might as well get that straight.

A. I beg your pardon, sir. The shelter deck.

Q. And was there cargo damaged by this oil?

A. Not to any great extent, sir.

Q. And how about the hatches, did it go down any of the holds, or what happened?

A. Well, forward of these tanks is a hold, with the 'tween deck below, and these hatch boards were all covered in cocoanut oil, and some oil had found its way down below.

[fol. 299] Q. And the tank tops covered; where else was there oil?

A. These tank tops; yes, sir.

Mr. Baker: When you said "these tank tops" you are referring to the port and starboard tank tops as shown in the photograph you are looking at?

The Witness: Yes, sir. Might I explain something? We usually call these tank lids, and the tank top is actually the top of the tank. That is why I paused there.

The Court: The tank lids.

The Witness: Yes, sir.

The Court: Not tank tops.

The Witness: No, we call—the tank top is the actual top of the tank, and we call these the tank lids. These are the lids, sir, and this will be the tank top. It is used for the purposes of making the report, so we all refer to the same thing. We call this the tank top and these the tank lids, although I have heard them called tank tops, frequently.

The Court: You mean the floor here is the tank top?
The Witness: Tank top, yes.
The Court: And this is——
The Witness: The tank lid.
The Court: The tank lid. I see.
Mr. Baker: That is new to us, too, your Honor.

By Mr. O'Neill:

Q. Now, this Respondent's Exhibit, R-4, in this report, have you made a note of the various times that things occurred aboard this vessel?

A. Yes, sir.

Q. And this report was made about the time of the accident, or the next day?

A. It is dated. January 6.

[fol. 300] Q. Now, you left, did you, after you saw the oil down in the shelter deck; after you saw the oil down in the shelter deck did you leave that part of the vessel?

A. No, sir; the Chief Officer and I went down below to the 'tween deck to inspect the cargo down there.

Q. And to go down to the 'tween deck, how did you go down?

A. We took the two hatch boards off forward and went down the ladder.

Q. When you say "forward", where would you say the ladder is?

A. The ladder is amidships—on this end of it. This is the after end of the hold and the ladder is here [indicating].

Q. And you went down, you and the Chief Officer, down to the 'tween deck to see what damage had been done down there, is that correct?

A. Yes, sir.

Q. And to do that you had to take hatch covers off?

A. We took two off, yes, separated two.

Q. These hatch covers; of what are they made; we have been looking at tank lids there all the time; what are the hatch covers made of?

A. They are made of wood.

Q. And they are part of the hatch that is immediately forward of these tanks, is that correct?

A. Yes, sir.

Q. Now, you say you went down with the Chief Officer. And about how long were you down there?

A. Possibly 10 minutes.

Q. And then you came topside?

A. Yes, sir.

Q. Was there anybody down there working at that time?

A. Yes, sir.

Q. Who was?

A. Various members of the El Dorado Company were down around the pump.

Q. They were working around the pump?

A. Yes, sir.

[fol. 301] Q. Then you came topside?

A. Yes, sir.

Q. Now, when was the next time that your attention was attracted to anything out of the ordinary at No. 3 hatch?

A. I was out on deck again, from time to time, to see when they started pumping, and when—I think my notes here show something of the time.

Q. Refer to your notes, if you need them to refresh your recollection.

A. At 12:45 they attempted to get suction. At 12:45 the leak was repaired and they attempted to start the pump again.

Q. And did you watch them at that time?

A. I watched them for a while, yes.

Q. And did they get the pump started?

A. No.

Q. Then what did you do, if anything?

A. I went inside and sat down.

Q. And when you say you went inside——

A. In the accommodation.

Q. And was there anybody else in there when you went in?

A. The Chief Officer was there.

Q. Now, when you say "the accommodation", you mean right behind the doors on port and starboard are the officers' accommodations?

A. Yes, sir.

Q. And when I say "the doors", I mean on Respondent's

R-2. So you were in there. And while you were in there, will you tell us what happened?

A. Well, shortly after that we heard a great commotion outside and someone shouted up the stairs in Norwegian, which the Chief Officer interpreted to me that somebody had fallen down the tank.

Q. And as a result of that did you do anything?

[fol. 302] A. I went out on deck to see what was happening.

Q. And did you assist in the rescue efforts?

A. I went down the tank and helped to pull him out of the oil.

Q. Now, at the time—any time that you were looking down this tank, or when you went down at 12:15, or when you looked down at 12:45, how was the lighting in that tank—that hold, I should say.

A. I'd say it was very adequate.

Q. There was sufficient light for you to see what you were doing?

A. Yes, sir.

Q. And to see the men working?

A. Yes, sir.

Mr. O'Neill: That is all.

Mr. Baker: In the orderly procedure am I next or is Mr. Cunningham next?

Mr. O'Neill: The libellant is next.

The Court: Beg pardon?

Mr. Baker: On cross examination, I want to get the procedure. Does the libellant go now?

Mr. O'Neill: I have nothing to say about it. It is between the libellant and respondent-impleaded.

[Remarks off the record.]

Cross examination.

By Mr. Baker:

Q. You were talking about the lighting. When the man was in the hold, in the oil, did they require any light to go down into the tank where the man was?

A. Yes.

Q. And where did they get that light?

A. They must have taken one of the lights that were hanging over the hatch coaming, because it came down so quickly. If they had gone to fetch it from some locker, or somewhere, it would have taken quite a while.

Q. And who took that light?

A. I didn't see.

[fol. 303] Q. And what sort of light was it?

A. It is what they call a cluster light. It is a cluster of possibly hundred-watt bulbs, about three or four, in—I am afraid I have to do this now—in a thing like this [indicating] on the end of a cable, and it is used for down cargo hatches, you can carry it and hang it up where you want it.

Q. And was that furnished by the ship?

A. Yes, sir.

Q. And after the cluster light was brought down in the hold, where the oil was, where the man was drowning——

A. Yes.

Q. —did you look upstairs to see whether or not it was light or dark there?

A. Well, the light was down the tank before I went down there, and there was plenty of light in the 'tween deck—in the shelter deck at all times.

Q. You recall that?

A. Yes.

Q. Did you put that in your report?

A. It wouldn't be necessary. I was reporting on the discharge of the oil.

Q. This you recall, then?

A. Yes.

Q. From your own recollection?

A. Yes.

Q. And when this photograph was taken, I understand that you were there assisting them taking the photograph?

A. Yes.

Q. I assume that you are still doing work for the same vessels, or group of vessels, or shipowners, who hired you for this occasion?

A. We are still retained by Barber Line.

Q. And you are still doing that work?

A. Yes.

Q. And it was at their request that you came to this vessel at the time when the photographs were taken to assist them taking the photographs?

A. Yes, sir.

Q. And you were willing to cooperate there, were you not?

A. I beg your pardon?

[fol. 304] Mr. O'Neill: Objection.

Q. You were willing to cooperate with the photographer?

A. I was asked to go there and direct them.

Mr. O'Neill: I don't like the use of the word "cooperate".

The Court: I don't know just what he means by that.

The Witness: I was requested to go there——

The Court: You don't mean any sinister connotation by using the word "cooperate", do you?

Mr. Baker: No.

The Court: I didn't think you had.

Mr. Baker: No.

The Witness: I was the only man around who knew—who recollected how the tank lid was placed, and they requested me to go there and direct the photographer, and the ship's crew to place the lid in that position.

Q. And then you told the photographer just how it was, from your recollection, the tank lid, the other circumstances, and then he took the photograph?

A. Yes.

Q. Did you also show him these beams, where they were, these hatch beams?

A. Well, those beams were there when I was down there. There was no occasion to move them.

Q. Well, I am asking at the time when the photograph was taken, did you then tell them also to place the beams there, or that's the way the beams were, do you recall that?

A. Well, I just placed the tank lid the way it was, and I noticed the beams were there, and they were in the same position as they were at the time of the accident, and I left them there.

Q. And were these beams, as shown in this photograph, [fol. 305] now marked R-2, in that position at the time

of the occurrence of this accident to Mr. Skovgaard, in that position?

A. Yes.

Q. And you left them there when the photograph was taken?

A. Yes.

Q. Was it also two beams, as far as you recall?

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. And were they substantially in the same position?

A. Yes, as far as I know, they have never been moved since, they stayed there all the time.

Q. You mean they were there all the time?

A. That's the best place to keep them, so that's where they stay.

Q. You mean every time you went on the vessel that's where you found these beams?

A. I didn't particularly notice, I didn't particularly look for beams, but they were there at the time of the accident, and they were still there at the time we took these photographs. And I say they seem to be left here ever since.

Q. Had you been on this same vessel from the time of the accident to Mr. Skovgaard until the time when the photographs were taken?

A. I must say I believe so. It might have been my colleague or it might have been myself.

Q. And were the beams there on this other occasion, or other occasions, the same beams, between the same hatches?

A. I had no occasion to notice them, or make note of them.

Q. Now, you did recall, I understand, that at about a quarter of 12 there was a leak from the pump.

A. Yes, sir.

Q. You made a note of that, too?

A. Yes.

Q. About a quarter to 12. And then you also recalled that there was oil over the decks—the lids, rather, this [fol. 306] port lid and also the starboard lid; you saw that?

A. What time do you mean?

Q. What time was it that you saw it?

A. First there was a small leak from this discharging line. Do you mean at that time?

Q. No, when was the time that you saw this oil all over the lids, the starboard and the port lids?

A. Immediately after the heavy leak.

Q. And could you tell us whether any of that oil was also on the beams in between both port and starboard tanks?

A. There was oil on everything, all over the place.

Q. Now, at the time when this lid, the port lid, was placed athwartships, across the ship, that was done by the ship's crew, wasn't it?

A. I don't know. I think in my previous testimony I said that there were some people down below in the shelter deck putting the lid on.

Q. Who was operating the winches?

A. The ship's crew.

Q. And there was ship's crew there that was placing the lid on the shelter deck, was there not?

A. I think in my previous testimony I said that I couldn't recall exactly who they were. I believe they were the El Dorado people.

Q. And were there ship's officers around at the time when this lid was being placed in that position?

A. Yes, there were.

Q. Which officer was present?

A. I particularly noted the Chief Officer.

Q. Was the Third Officer there?

A. There was some other officer, it may have been the Second or Third. I wouldn't know, particularly.

[fol. 307] Q. Where was he at the time, was he on the top deck, or was he at the 'tween deck, when this lid was being placed in the position as shown in the photograph, R-2?

A. I can't recall.

Q. Now, what is this here [indicating], what do they call that?

A. They call that a manhole——

Q. A manhole cover?

A. Yes.

Q. And is that sufficient room for a line, a pump line to be placed into that manhole cover for the purpose of loading or unloading the oil?

A. Yes.

Q. Have you ever seen oil, cocoanut oil, loaded?

A. I have never seen it loaded.

Q. You have never seen it loaded?

A. No, sir.

Q. Do you know how they load it, do they take the tank top off, or do they load it through this manhole cover?

A. It varies, I believe, they usually take—through both, through the manhole cover, and with the lid off.

Q. When they load it.

A. Yes.

Q. And when they unload it, it also varies?

A. No, I have always seen the tank lid taken off.

Q. You have never seen it with the tank lid on and unloading through the manhole cover?

A. Not on a tank of this type.

Q. You have seen it on other tanks?

A. Well, some tanks have no lid, just a manhole cover. They are small tanks, usually aft in the ship, down in the tunnel, down at the bottom of the ship.

Q. You mean you can't take off the lid?

A. There is no lid.

Q. So that you have to go through the manhole cover?

A. Yes.

[fol. 308] Q. And isn't that safer?

A. No.

Q. It is not safer?

A. No.

Q. Just as safe, you say, to open up this lid, tank lid, and have this big opening with this hot oil in there as it is to load or unload through this manhole cover, with the lid closed?

A. Well, it is never—they always take the lids off these tanks, because if you only have a small opening, like a manhole cover, you have, maybe, one or two lines going to it, for a start, and that makes it hard to get down. And, also, if you only have that small opening, there is no—very often you get no air in the tank, and it has happened before, people have gone down in the tank with just the manhole cover off, and they have been killed down there, there has been no oxygen in the tank.

Q. But there is no need, is there, at the beginning, at

least, for anybody to go into the tank, you can put the hose in the tank and either load or unload it?

A. Yes.

Q. Pardon?

A. Yes, you could do it.

Q. Did you know that the Captain has testified that in the loading of this tank they don't take off the tank lid?

A. I didn't know that, but I can quite believe it.

Q. And in the unloading at the beginning there is no reason to take off the tank lid, is there, until most of the oil is out?

A. Well, it would be quite an operation to take off the tank lid, with the pump down there, and the pipe lines, and everything.

Q. No, I mean at the beginning there is no reason—until most of the oil is out, it can be taken out through this manhole cover, can't it?

A. But then you have to remove the lid after that.

Q. That is just a little bit more trouble, isn't it?

[fol. 309] A. Well, it would be quite an operation with the pump down there, and the pipe lines—you might damage the pump. And I have always seen the lid taken off first.

Q. And you have never in your entire operation seen the lid on and the pump lines going through the manhole cover?

A. Never.

Q. Have you seen any other ships other than this ship——

A. Yes, sir.

Q. —done that same way?

A. Yes, sir.

Q. What other ships?

A. Well, the ships of the Delarama Line, ships of the Booth Line, American President Lines, Belgian Line.

The Court: Is that all the lines you can recall that do it that way?

The Witness: At the moment; yes, sir.

The Court: You want the Court to understand that that is the standard practice?

The Witness: Yes, sir.

Mr. Baker: That is all at this time.

Mr. Cunningham: Can it be stipulated now as to the date when these photographs were taken? I have January 11, 1955.

Mr. O'Neill: Yes.

The Witness: That's right.

Mr. Cunningham: Mr. Baker, do you have any objection to stipulating the date these photographs were taken as January 11, 1955?

Mr. Baker: No objection.

Cross examination..

By Mr. Cunningham:

[fol. 310] Q. Do you recall, sir, what cargo was in the wing, the starboard wing, at the time of this accident?

A. I believe it was bales of sisal, and I think there were some bundles of rattans.

Q. Were there any bags of cocoanut meal?

A. Not as far as I know.

Q. Do you remember whether the cargo in the starboard wings was affected by this oil leak?

A. I think this cargo was for discharge at another port, and some oil had run behind this cargo. The oil spurted out more or less forward of the cargo and then it ran behind it. And whether it had touched some, we don't know.

Q. This nipple that broke spurted the oil forward of the tank lids that are shown in the photograph before you?

A. Yes.

Q. Now, sir, were you requested to make a statement to a person who came to see you from my office?

A. No.

Q. You don't recall that?

A. No.

Q. Did you refuse to make such a statement?

A. No.

Q. You don't recall?

A. I definitely recall. Nobody has been to see me.

Q. Nobody has been to see you?

A. No.

Q. Did your employer speak to you concerning the fact

that a person from my office wanted to take a statement from you?

A. No. There was another surveyor there at the time.

Q. No, I asked you whether or not your employer spoke to you——

A. No.

Q. —concerning the fact that a person from my office was to see you in order to obtain a statement from you?

A. No.

Q. Did your employer or did you state that you would have to check with Mr. O'Neill before you could speak to anyone associated with my office?

A. No.

[fol. 311] Q. During the five or six times that you were at El Dorado previous to this accident, did I understand your testimony to be that they were using steam pumps?

A. No, sir. The usual practice around New York, on the ships I had been on, is to use steam pumps.

Q. But during the time that you were at El Dorado, were they using steam pumps, do you know?

A. No, they always have used, as far as I recollect, electrical pumps.

Q. And do you know whether or not, from your recollection, the electrical pumps you saw them using previously were the same one that was aboard this evening?

A. I don't think so. I heard some rumor that they got some new pump at one time.

Q. Not what you heard by rumor, sir, but if you can recollect.

A. Sir, the same type of pump, shall we say.

Q. About the same size pump?

A. Yes, about the same size.

Q. If I understand your testimony, it was the Third Officer who reported to you that there had been a leak in the pump at 11:45; is that your recollection?

A. Yes, my recollection.

Q. And this leak at that time was not the leak which caused the oil to be all about the shelter deck, was it?

A. It was the start of that leak.

Q. Well, the leak that caused the oil to be about the shelter deck was the breaking of some part of the pump which squirted the oil?

A. Yes. Well, this first leak was a crack in the nipple, and it leaked from that, and then it later broke off.

Q. And it was the Third Officer, you say, who came to you and said that there was a crack in the nipple of the pump and asked you to go look at it?

A. He didn't ask me, he just announced that there was [fol. 312] one. So I went down to take a look, to see what was happening.

Q. Did you determine the amount of the oil that was lost?

A. No.

Q. As a matter of fact, it was impossible to do so, wasn't it?

A. Yes.

Q. Do you have any duty with regard to the safe or efficient operation of the pump during the discharge of the oil?

A. No.

Q. Do you recall whether or not signals were being given to the men who were operating the winches at the time the tank lids were first being removed?

A. They must have been giving signals. You can't drive a winch blind.

Q. Well, the person who was giving signals to the winchman, do you recall who he was?

A. No.

Q. Do you recall whether these signals were given in English to the winchman?

A. No.

Q. Weren't they actually given in Norwegian?

Mr. O'Neill: I object to that. He said he doesn't know, sir.

The Court: I don't know just what he meant by that "no".

The Witness: Well, most signals are given by waving your hands.

By Mr. Cunningham:

Q. Well, do you know now, sir—do you recollect now whether or not these signals were given verbally, or by a wave of the hands, as you have indicated?

A. I can't recall exactly, but I should imagine it was a wave of the hand.

Q. You imagine; can you recall now whether or not [fol. 313] these signals were given by a wave of the hand or orally?

A. No, I can't recall.

Q. Have you heard signals given on Norwegian ships to winchmen orally?

A. Well, I would like to say that the seamanlike way of doing things is to give a wave of the hand.

Q. Have you heard signals given to winch operators orally on Norwegian ships?

A. Well, I can't speak Norwegian, so I wouldn't know what they were saying.

Q. Well, have you, from your experience, seen or heard signalmen shouting orders to winchmen which appeared to you as if they were giving orders to operate winches, even though you didn't understand what they said?

A. Any shouting is always accompanied by visual signals, because that's the only signal that would operate a winch.

Q. You mean by hand signals?

A. There is so much noise going on usually you can't hear what is being said.

Q. Let me ask you this question, which is really what I wanted to find out. Was it Mr. Sexton who was giving these hand signals?

A. Mr. Sexton was around the time the lids were being taken off.

Q. Please answer my question. Was it Mr. Sexton who was giving these hand signals to the winchmen?

A. I don't know.

Q. You mean you saw the man who did it and you don't know whether it was Mr. Sexton or not; is that your testimony?

A. I never——

Mr. O'Neill: I object to that. He didn't say that. You can ask him if he saw the man. He didn't say he saw the man.

By Mr. Cunningham:

Q. I thought your testimony was that you saw that sig-
[fol. 314] nals were given by hand. Am I correct?

A. I don't think I said that.

Q. Well, did you see the man who was giving the signals to the winchmen?

A. I saw him. I didn't take particular note of him.

Q. You did see him and did you see that the signals were given by hand or did you notice whether they were given orally?

A. We are back where we started.

The Court: Didn't he say he didn't recall whether it was orally or visually?

Mr. Cunningham: I think he also said he didn't recall whether he saw the man giving the signals, but now he said that he saw the man, but he can't recall who it was.

Mr. O'Neill: That isn't what he said. He said he may have seen him but may not have taken particular note of him.

Mr. Cunningham: That is what he said this time.

The Witness: I think my statement was that I noticed lids being taken off while I was down there.

Mr. Cunningham: Yes.

The Witness: And I assumed that somebody was giving directions to the winchmen.

Q. Maybe I am incorrect again. Did you just testify that you saw somebody giving a hand signal to the people who were operating the winches, but you don't now recollect who it was; it that your testimony?

A. That is my testimony, yes.

Q. Would you know Mr. Sexton if you saw him?

A. If I saw him on the street, no. If I saw him at El Dorado, I would know who he was.

Q. Well, was it that man who was giving the signals,
[fol. 315] this Mr. Sexton that you know who he was if you saw him at El Dorado?

A. I can't recall.

Redirect examination.

By Mr. O'Neill:

Q. Mr. Mallett, Mr. Baker asked you about these beams. Did you measure these beams at the time of the accident?

A. No.

Q. Have you any record there showing the height of the beams?

A. Yes.

Q. What is the height, what measurements did you take?

A. On January 11 of this year we were out at the ship and took some measurements——

Mr. Cunningham: I object to the answer. I believe this question was: Did he make the measurements at the time of the accident? He is prefacing his answer by the date, January 11, 1955. Now, if his testimony is what he did on January 11, 1955, I object to it.

The Court: Was he asked whether he made measurements at the time of the accident?

Mr. O'Neill: That's right. The objection is well taken.

The Court: All right. The objection is sustained.

By Mr. O'Neill:

Q. Now, you talked about these—well, you took them on January 11, 1955. How high were the beams?

Mr. Cunningham: I object to that as being immaterial, how high they were on January 11. That is not the issue before the Court. The issue is how high they were at the time of the accident.

The Court: Well, isn't that the next question? I assume that is going to be next.

[fol. 316] By Mr. O'Neill:

Q. Are these the beams——

Mr. Cunningham: I object. It is immaterial. As put now the question is immaterial.

The Court: Were the same beams there January 11 as were there the night of the accident?

The Witness: Yes, sir.
The Court: The same beams?
The Witness: Yes, sir.
The Court: All right.
Mr. Cunningham: Objection withdrawn.

Q. How high were those beams?
A. Nine inches at the end and 12 inches in the middle.
Q. And did you measure the hatch coaming?
A. Yes, sir.
Q. And how high is the hatch coaming?
A. Thirty-five inches.
Q. Now, you mentioned something about you have seen tanks discharge through the manhole cover. They are what is known as wing tanks, aren't they?
A. Yes, sir.
Q. And those tanks, the deepest they ever are is eight or nine feet, isn't that correct?
A. Eight to 10 or 11 feet; yes, sir.
Q. And, as you say, the only way they get into those tanks is with the manhole covers, isn't that correct?
A. Yes, they have two manhole covers. They take them both off.
Q. Two manhole covers?
A. Yes.
Q. And are they the same size as about the manhole covers we have in our tank lid here?
A. Yes, sir.

[fol. 317] Mr. O'Neill: That is all.
The Court: The coaming is the part of the tank that is above the deck, is that right?
The Witness: That's right.

Recross examination.

By Mr. Baker:

Q. The coaming is this part that is above the deck?
A. Yes.
Q. That is about 35 inches, just less than three foot?
A. Yes, sir.

Mr. O'Neill: Will you mark that, Mr. Baker, because you just pointed to it? Would you mark that, Mr. Witness, please?

The Court: Put 35 in there. We will know what it means.

[Witness marks photograph.]

By Mr. Baker:

Q. Now, referring to these hatch beams which are between the two hatches in this photograph, R-2, do you recall whether or not they were resting upon anything, any hatch covers, or any objects of any kind?

A. They were resting flush on the deck.

Q. You are sure of that?

A. Yes.

Q. You remember that?

A. Yes.

Q. Up to the present date you remember that of your own recollection?

A. Yes, sir.

Q. You have no notes of any kind to refresh your recollection on that?

A. Yes, sir.

The Court: Wait a minute. That is a hard answer to get. You have no notes to refresh your recollection on that fact, do you?

[fol. 318] The Witness: No, sir.

The Court: He said, "Yes, sir," before.

By Mr. Baker:

Q. You remember this of your own memory, back to the date of this accident, without any notes, or any records, or any papers of any kind?

A. Well, I had my little notebook here and made a sketch of the situation as it was, and had these beams been anything other than resting on the tank I think I'd have made a note of it.

Q. And have you got the beams in this little sketch?

A. No.

Q. And when you say "this little sketch", that's R-3?
A. Here. It goes this way [indicating].
Q. It doesn't show the beams in that——
A. No.
Q. —between these two hatch covers?
A. No.
Q. Now, could you tell us whether they were exactly the same beams, the same height, or might they have been a different height?
A. They were the same beams.
Q. How do you know it's the same beams?
A. I didn't mark them at the time, but they are the beams used for putting in the 'tween decks of the deep tanks.
Q. Can you positively say they are the same beams or do you just believe they are the same?
A. I can say I very much believe they are the same beams.
Q. But you can't be positive, can you?
A. We can't be sure of anything, can we?

The Court: Yes; life, death and taxes, and trouble.

By Mr. Baker:

Q. Now, were you present the next morning when there was a transfer from one tank to the other tank?
A. Yes, sir.
[fol. 319] Q. You were there, too?
A. Yes.
Q. The next morning?
A. Yes.
Q. That was about 11 o'clock in the morning?
A. Yes, around about that.
Q. And as a result of the oil being taken out of the port tank it made a list to the starboard side of the vessel, did it not?
A. Yes.
Q. And in order——
A. Excuse me, sir. You are talking about the transfer of oil now, aren't you?
Q. Yes.
A. Well, the transfer—the oil was taken out of the starboard into the port tank.

Q. Well, was there a list of the vessel about 11 o'clock the next morning?

A. When they finished pumping out the port tank there was a list on the vessel.

Q. Much of a list?

A. Yes.

Q. How much of a list?

A. I guess 10 degrees.

Q. And something had to be done to correct that list, isn't that so?

A. This list was at the time they finished discharging the port tank completely.

Q. Yes. And you had to do something to correct that?

A. Yes.

Q. And to correct it you had to transfer some oil from one tank into the other tank?

A. Yes.

Q. What was the transfer, from what tank into what tank?

A. From the starboard tank into the port tank.

Q. So that you then had this starboard tank full of this oil?

A. Yes.

Q. Other oil?

A. Yes.

Q. And it was not intended to be unloaded at this par-
[fol. 320] ticular port, the starboard tank?

A. No.

Q. So that you then transferred part of the oil from the starboard tank into this port tank?

A. Yes.

Q. And were you there when this transfer took place?

A. Yes.

Q. And was that transfer made with this tank lid closed—with both tank lids closed?

A. It was made with this lid open and this lid closed [indicating].

Q. So that you were able to take the oil from the starboard tank through this manhole cover?

A. Yes.

Q. And you left this port tank open, the way it was in this photograph?

A. Yes.

Q. You had no trouble taking the oil out of the starboard tank into the port tank——

A. No.

Q. —through the manhole cover?

A. No.

Q. And if the lid wasn't open like this on the port tank you would never have opened them up, you would have transferred it from the manhole cover of the starboard tank through the manhole cover of the port tank; isn't that so?

A. I wasn't in charge of the operation.

Mr. O'Neill: I object——

The Court: He answered that he was not in charge of the operation. That was none of his business.

Mr. O'Neill: No.

By Mr. Baker:

Q. Isn't that the way it is usually done?

A. In fact, I have never seen it done before.

Q. What?

A. I have never seen this done before.

Q. The transfer?

A. No.

[fol. 321] Q. That was the first time you saw a transfer of oil take place?

A. Yes.

Mr. Baker: From one tank into another tank.

That is all.

Redirect examination.

By Mr. O'Neill:

Q. Now, in transferring the oil, of course, you weren't going all the way down—they weren't going down to the bottom of the starboard tank, were they?

A. No.

Q. They were just going down, at most, halfway to put it into the port tank to even off the two tanks?

A. I may have a measurement here. I can't recall. It might be in the report here.

The Court: Well, the purpose of the transfer is obvious, isn't it, Mr. O'Neill?

The Witness: Thirteen feet down.

Mr. O'Neill: I think that is all.

Mr. Cunningham: No further questions.

The Court: That is all for Mr. Mallett. You are excused, Mr. Mallett.

The Witness: Thank you.

[Witness excused.]

The Court: Gentlemen, we will take a short recess.

[Short recess.]

Mr. Cunningham: May I ask Mr. Mallett one or two questions.

The Court: Mr. Mallett, will you please resume the stand for one or two questions.

JOHN MALLETT, resumed the stand.

Recross examination.

By Mr. Cunningham:

Q. Referring to your report, which is Respondent's Ex-
[fol. 322] hibit 4, would you tell me whose signature that is, at the end of the report, please?

A. That is my employer, W. H. Twemlow.

Q. And did Mr. Twemlow contact you concerning the fact that someone from my office had been to him to speak to you?

A. No.

Mr. Cunningham: All right. No further questions.

Redirect examination.

By Mr. O'Neill:

Q. Immediately after the accident did you take measurements of the tank?

A. Yes.

Q. And did you make a note of those measurements?

A. Yes, sir.

Q. And do those measurements appear in Respondent's Exhibit 3, which I show you?

A. Yes, sir.

Q. And what did you find at that time, what were the measurements?

A. I took a measurement from the tank—top of the tank coaming down to the oil level, at the two corners of the tank. On the port side it was 22 feet and on the starboard side it was 21 feet seven and three-quarters inches.

Q. So that the oil we had in the port tank was almost level, is that correct?

A. Yes.

Q. From one corner to the other?

A. Yes.

Q. And, in taking those measurements, will you point out on Exhibit R-2 where you took them?

A. Here [indicating].

Q. "X".

A. And here [indicating].

Q. "X". And about what would the list be at that time of the ship, if any?

A. I worked it out from these figures and it came to two degrees and six minutes.

Recross examination.

By Mr. Baker:

Q. In this figure, R-3, what is that round ring there?

[fol. 323] A. That is the manhole, here [indicating].

Q. You have set that up in this little description that you made?

A. I made a sketch of the situation. I think it is marked "manhole"—yes, manhole, the scroll there.

Q. What is that figure?

A. That's nine feet eight inches.

Q. What is that?

A. That is the length of the tank—of that tank—the end of the tank lid.

Q. That's the length of the tank lid?

A. Yes. The breadth of it, actually—length, because it is lying that way.

Q. What are these words here, referring to the same Exhibit?

A. "Bucket" something.

Q. Bucket. That's R-3?

A. Yes.

Q. The bucket——

A. It might be "grease"—I don't know. I haven't got my glasses with me this morning.

Q. Was there a bucket there for the oil leak from the pump?

A. It was part of the pumping operation. I believe it belonged to the El Dorado.

Q. What are these words here? Referring again to this Exhibit R-3.

A. That's "sounding plug" or "sampling plug". As you see, it is that thing there [indicating].

Mr. Baker: That is all.

Redirect examination.

By Mr. O'Neill:

Q. Mr. Mallett, that tank cover, or lid, as you call it, was how many feet long?

A. Nine feet eight inches.

Q. And how wide was it?

A. That's the width of it.

Q. How much was it fore and aft?

A. I didn't measure that.

Q. The width of it is 9-8?

A. 9-8.

[fol. 324] Mr. O'Neill: That is all.
The Court: Step down, Mr. Mallett.

[Witness excused.]

FINN FOLKMAN, called and sworn for the respondent, testified as follows:

The Clerk: May we have your full name?
The Witness: Finn, F-I-N-N, Folkman, F-O-L-K-M-A-N.
The Clerk: And your address, for the record?
The Witness: Eidanger.
The Court: What is that, the name of the town?
The Witness: That is a little town in Norway, yes.

Direct examination.

By Mr. O'Neill:

Q. Mr. Folkman, by whom are you employed at the present time?
A. Excuse me?
Q. By whom are you employed at the present time?
A. I am employed by shipowner, P. Meyer, in Oslo.
Q. And at the time of the accident you were employed by what company?
A. By Wilhelm Wilhelmsen.
Q. In December of 1952 what vessel were you connected with?
A. I was Chief Officer on the Tungas.
Q. How long had you been with that vessel?
A. I had been over a year Chief Officer there.
Q. And how long had you been going to sea before 1952?
A. Since '31.
Q. And how long have you held an officer's license?
A. Since 1936.
Q. And do you hold a master's license?
A. That's right.
[fol. 325] Q. And when you came into New York in December of 1952 you had aboard in your two deep tanks some cocoanut oil, is that correct?

A. Yes.

Q. Where did you load that cocoanut oil?

A. In Cebu in the Philippines.

Q. Will you describe for us how that cocoanut oil is loaded in the Philippines?

A. When we come to Cebu we clean our tanks. That is done by a crew ashore. And after they are cleaned the tank lids are placed in position on top of the tank trunks. And then a surveyor comes aboard, the manhole is then removed, and he goes down into the tank to inspect the tank for cleanliness, and also for tightness, concerning the steam coils which we use to liquefy the oil so that it won't get stiff. And after that the oil is driven down to the ship's side in trucks, the pump is placed on the pier and the hose is placed over the ship's side, down into the shelter deck and into the manhole. And the pumping commences then.

Q. And what is the purpose of all this precaution that you take over there at Cebu?

A. Well, that is not to contaminate the oil after it is driven down to the ship.

Q. And after the tank has its cargo in, then what is done?

A. When the cargo is in the surveyor comes on board again, the oil is measured, the temperature is taken, oil tests are taken—some are taken ashore and two tests are given to me. And then the manhole is screwed back into position, under the surveillance of the surveyor.

Q. Now, Mr. Folkman, this oil, this cocoanut oil, did you carry that in accordance with a special contract?

A. Yes.

Q. And this paper I have just handed you, is that the contract covering the carriage of this oil?

[fol. 326] Mr. Baker: I object, it is immaterial, the contract, insofar as this action is concerned, so far as the libellant, at least, is concerned.

The Court: The objection is overruled.

Mr. O'Neill: I will offer this in evidence.

[Question read.]

Mr. Cunningham: May I have the question read.

Mr. Cunningham: I object to it as not being binding upon the respondent-impleaded unless the respondent-impleaded is a party to the contract.

Mr. Baker: I object to it as not being binding upon the libellant.

The Court: What are you worrying about? There are two respondents here, one is impleaded.

Is El Dorado a party to this, sir?

Mr. O'Neill: No, sir.

The Court: Then how is it material or binding on him, anyway?

Mr. O'Neill: Well, in this sense. This is the contract that—El Dorado was hired by these people to pump out the oil in accordance with this contract, which is the usual cocoanut oil in bulk contract that all cocoanut oil is carried under.

Mr. Watson: Your Honor, this shipment was carried under a cocoanut oil in bulk contract, which is now being offered in evidence, and, as well, under a bill of lading. The bill of lading is made subject to the terms and conditions of the contract. By the time the ship arrived in New York that bill of lading had been negotiated to Pacific Vegetable Oil Company, on whose behalf El Dorado was discharging [fol. 327] the oil. Pacific Vegetable Oil Company was the owner of the shipment and took that shipment under the bill of lading, which was subject to the terms of this contract. And that is the relevance and the contractual tie-in.

Mr. Cunningham: I still object. He still hasn't shown any reason why it is binding on El Dorado. El Dorado pumped the oil out on behalf of a consignee, who, Mr. Watson says, is the person who is bound by this contract. I see no way in which El Dorado might be bound by the contract, because they worked for the consignee in pumping the oil out.

Mr. O'Neill: I will call on Mr. Cunningham then to produce the president or some officer of El Dorado who has knowledge of this, because the only man produced to date has been Mr. Blaney—and we haven't see Mr. Sexton yet—but those gentlemen don't seem to know why they were working.

Now, if he is going to deny a bulk oil contract of a company like El Dorado, that they didn't know their responsibility, sir, I think we are entitled to ask him to produce the man here who knows about it.

Mr. Cunningham: We have been asked in Interrogatories—in which we have said that we pumped out the oil for Pacific Vegetable Oil Company to be stored in our tanks for their use. However, I don't know what in a contract between a shipper and a consignee is binding upon the person who acts as agent for the—not even consignee, but the person elected to receive the oil under this bill of lading. What is binding upon us, what in the contract are we supposed to know? Certainly Mr. O'Neill cannot call upon me to provide someone for him to prove the contract relevant to my client.

[fol. 328] If Mr. O'Neill intends to prove the contract relevant, I submit it is his obligation to find and produce someone who can testify.

Mr. O'Neill: Sir, I say this. This is a common instrument used in the oil trade under which this oil is carried. El Dorado are people who were storing this oil and are thoroughly familiar with the obligations of the contract. And they were called up——

The Court: Now, you assume that, too, don't you? You make that blank statement that they are thoroughly familiar with the terms of the contract, the El Dorado people. How do we know that?

Mr. O'Neill: Well, I say that they are because they say that they store cocoanut oil. And if they take cocoanut oil on the ship, they must know in the trade that this is the contract under which it is carried.

The Court: Did you hear that statement, Mr. Cunningham?

Mr. Cunningham: I heard the statement. It sounds as if Mr. O'Neill is testifying. Perhaps the Answers to Interrogatories will be sufficient for Mr. O'Neill. I don't know what in the contract he wants to prove.

Mr. O'Neill: I will mark it for identification.

The Court: Let's mark it for identification.

Mr. Cunningham: In the protection of my client I can't admit contracts which have not been proved as binding upon me.

Mr. O'Neill: We will mark it.

The Court: Yes, you may be able to tie it in with some-
[fol. 329] thing later.

The Clerk: The contract will be marked R-5 for identification.

[Marked Exhibit R-5 for identification.]

The Court: You didn't hear that comment, Mr. Cunningham. Mr. O'Neill said that if you state that the answers are in the Interrogatories, that is enough for him.

Mr. Cunningham: As I recall, we answered Interrogatories by stating that we were hired by Pacific Vegetable Oil Company and we pumped out the cargo of cocoanut oil and that we had the obligation to pump it out. I don't think there is any question about that.

But a contract that is offered in evidence, the terms of which have no application to my client, even though it would be innocuous, I would still object, because it is not material.

The Court: Well, it may become material at some point or other, I don't know.

Mr. O'Neill: Mr. Baker, about the log, you have checked our translation, have you?

Mr. Baker: I have checked the translations and I see no material difference in any of the translations. So that counsel is at liberty to use any of the translations.

Mr. O'Neill: Mr. Cunningham, is there any objection to this translation of the log?

Mr. Cunningham: Is that the translation we produced? Have you compared this with the one that I produced?

The Court: He says that there is no substantial difference that he can find.

Mr. Cunningham: Then I have no objection.

[fol. 330] The Court: Then it may be marked.

The Clerk: R-6 in evidence.

[Received and marked Exhibit R-6.]

Mr. Baker: No objection.

By Mr. O'Neill:

Q. Mr. Folkman, I am going to leave the log here. If I ask you questions and you have to refer to the log to get the times and the dates, you may do so.

Can you tell us, Mr. Folkman, when your vessel arrived in New York, New York Harbor?

A. We arrived three days before discharging of the oil.

Q. What date was that?

A. We arrived in New York on Sunday, the 30th of November.

Q. And when you came into New York, you went to what pier?

A. We went to 38 Atlantic Basin, Brooklyn.

Q. And you discharged cargo there until what date?

A. We discharged cargo, general cargo, there until December 5.

Q. And on December 5 did you receive any orders?

A. I received orders that we were going over to El Dorado to discharge oil.

Q. When the vessel arrived at El Dorado did you go ashore to see the people at El Dorado or did they come aboard?

A. No, they came on board.

Q. And who came aboard?

A. A man who introduced himself as Mr. Sexton to me.

Q. Now, will you describe for us what was first done, as far as No. 3 hatch was concerned; did you come in with No. 3 hatch covered?

A. Well, Mr. Sexton came on board and told me that they had the pump and lines ready to discharge the oil [fol. 331] from the port deep tank. At the same time two surveyors arrived to take the necessary ullage measurements, and tests, and temperature—measurements of the oil.

Q. Now, who opened up the hatch?

A. Our crew opened the main deck first, took out the beams in the main deck, and placed the beams on deck, and the hatches alongside the coamings, as usual.

Q. And on the main deck you had beams and wooden hatch covers, is that it?

A. That's right.

Q. Now, then, when it came time to go below into the shelter deck, did people from El Dorado go with you, or did you go alone, or tell us what happened there.

A. Well, during any discharge of any tank the ship, as a courtesy, always gives the company some of the crew members to help them, to be used for ship's equipment, to drive winches, and to hoist their equipment on board the ship.

Q. And how many crew members did you give them in this instance?

A. I gave orders to two of our crew to be on board all night, and, naturally, the officer on watch, and myself.

Q. Now, these crewmen that you had on when you arrived at El Dorado, after opening the main hatches, what did they do?

A. They went to the winches.

Q. And how many men do you need to run your winches on that ship?

A. Two men.

Q. Now, did you stand by?

A. Yes, I was around.

Q. And were you there when they took the tank cover off?

A. Yes.

Q. Were you down in the hold at that time or up on deck?

A. No, I was up on deck.

Q. Who was down in the hold?

A. The El Dorado Oil people.

[fol. 332] Q. And what was done at that time?

A. Well, they connected the tank lid to the runner wire of the winch. The officer on charge, which was the Second Officer then, he directs our men, because they cannot see down in the hatch, the winches are placed so far out, they stand on this side, they would have no—they will not be able to see well down here [indicating].

The Court: Who guided them?

The Witness: Our Second Officer. He was on watch.

By Mr. O'Neill:

Q. And your winchmen were where?

A. They were standing in these winches.

Q. And you point to the winches on the port and starboard side of Exhibit R-2.

A. Yes, the after part of the hatch.

Q. And the people down the hold—now, when you lift this cover up—let me ask you that first—it swings around in the air, is that right?

A. That's right.

Q. And once you get it off the deck, or out of its position, it isn't hard to swing, is it?

A. It has to be swung.

Q. And who was swinging it?

A. The man from the oil company was swinging the lid.

Q. And they placed the lid where?

A. They placed the lid acorss (sic) the tank, in the fore part of the tank.

Q. Now, look at Respondent's Exhibit R-2 and tell the Court whether or not that is where they placed the lid?

A. That is the position of the tank lid.

Q. Now, did that lid overlap over onto the starboard lid?

A. No.

Q. Now, after the lid was in position, what was the next [fol. 333] thing that was done aboard the ship?

A. We took on board a pump.

Q. And how was the pump taken aboard?

A. By our winches.

Q. Did you send out the wire sling to the dock?

A. The wheel or the hook down onto the pier and the pump is hooked on.

Q. And then that was taken aboard?

A. Yes.

Q. And as that came over the side your men were still at the winches, is that right?

A. That's right.

Q. And the officer was telling you to come back with a hand signal, is that it?

A. Excuse me.

Q. How was the officer directing them to come back?

A. Well, you know, the winchmen see themselves how the pump comes on board. It is not necessary to do much directing there. But if it is necessary, after the pump comes down in the hatch, the Second Officer, who was on watch, will direct them, because he looks down into the hatch and gets his orders by the man who stands on the tank lid and wants to place it.

Q. So the men down on the tank lid, in this case El Dorado men, they told the Second Officer when to lower?

A. That is obvious.

Q. And he gave the signal to your winches?

A. Yes.

Q. Now, does your log show what time you started taking the equipment aboard and what time you started pumping?

A. At 1830 the ship's crew took on board the oil company's pump and hoses.

Q. And that is about 6:30?

A. Yes.

Q. Now, who connected that pump, did the crew have [fol. 334] anything to do with connecting it?

A. No, the El Dorado Oil Company's people.

Q. And what lighting was supplied at that time?

A. Well, it was dark then, and we have, first of all, four deck lights, which are permanent—that's to the fore part of the amidships. You can see them on this Exhibit here. These are the permanent deck lights here.

Q. Will you mark that with "PL"?

A. [Witness marks photograph.] And then are also two permanent deck lights on the opposite side of the hatch, on another building.

Q. In other words, in the forward part here you have also two permanent lights like that?

A. That's right.

Q. And what other lights were there?

A. Here you have our Sampson posts, to which the derricks are connected, and on top of these Sampson posts are two reflectors with 500 ampere bulbs shining down into the hatch and lighting the whole deck here. They have a reflector inside so they throw the light better.

Q. And how high above the deck are these lights that you just told us about?

A. Well, I should imagine—no, I can say for sure, 7 meters.

Q. How much is that in feet?

A. Seven meters, that is times three, 21 feet.

Q. And they are the ship's regular cargo lights that shine right down into that hatch?

A. They are permanent lights. And then we had four lights placed in each corner of the hatch here. This is not quite correct here, because the hatch was not entirely taken off. There are three sections, hatches, and two sections were taken off. The forward section was not taken off. So the light was placed here—let's say where the other sec-
[fol. 335] tion starts—here, here and here [indicating]. So four lights were shining down into the hatch.

Q. And is there anything in your log about that?

A. I hardly think so. I don't think so.

Yes. The inside of the hatch, the shelter deck, was lit up with four clusters of 500-watt lamps. That's right.

Q. How many cluster lights do you have on a ship like that?

A. Thirty.

Q. So there was no scarcity of lights on the ship, was there?

A. No, we can work 14 gangs and have them supplied with lights, if necessary.

Q. Now, did you stay there till they started pumping, until the pump started?

A. No, I did not. After the pump was connected and the tank lid was swung into place, and the pump was connected, I had nothing to do any more then. But I was on board.

Q. Now, when was the next time that your attention was called to anything that may have happened in the No. 3 hold?

A. Well, the Second Mate, who was on watch before 12, he came to my room and told me that there must be something wrong with the pump working down there.

Mr. Cunningham: I object to what the Third Mate told him.

The Court: Unless he is going to be produced.
Mr. O'Neill: I will correct it.

By Mr. O'Neill:

Q. About what time did you hear from one of your officers about something in No. 3 hatch?

A. Around 9 o'clock.

Q. And as a result of hearing that, what did you do?

A. I went on deck, looked down in the hatch.

[fol. 336] Q. And when you looked down in the hatch, what did you find, if anything?

A. I saw the pump working down there, but I didn't see any of the pump crew around.

Q. And what did you do as a result of that?

A. I went ashore to find them.

Q. And did you find them?

A. Yes, I found them.

Q. Where were they?

A. I found them up in Mr. Sexton's office.

Q. And at that time did you have a conversation with Mr. Sexton?

A. That's right.

Q. And what was that conversation?

A. I told Mr. Sexton that there always had to be one man standing by down in the hatch while the pump is working.

Q. And what did Mr. Sexton say?

A. Well, Mr. Sexton told me that he was in charge and I should mind my own business.

Q. Now, did a pump man come aboard as a result of that request by you?

A. He did. I told him that there was something wrong with the pump.

Q. Do you know what was wrong?

A. The bearing probably was burning, because it smoked.

Q. And somebody came aboard at that time, is that it, to take care of that?

A. Yes.

Q. Now, when was the next time that your attention was called to——

A. When the leak occurred.

Q. What is that?

A. When the leak occurred.

Q. And who called that to your attention?

A. The Third Officer, who was coming on watch after 12.

Mr. Cunningham: I didn't hear that.

The Witness: The Third Officer, who came on board [fol. 337] after 12, who came on watch after 12.

Q. And what time was that; is there an entry in the log on that?

A. Yes, it was at 12:15. Yes, at 12:15, fifteen minutes past midnight.

Q. And as a result of that report, what did you do?

A. I went on deck and had a look.

Q. And what did you see at that time?

A. Well, when I came on deck the connection was off, it wasn't a leak, but oil was spurting out of the hole, of the hole in the line.

Q. And as a result of that did you do anything?

A. Well, I didn't see anybody down there. We had to get hold of some of the oil crew. We couldn't stop it.

Q. And did you get any of the oil crew?

A. Yes, we did.

Q. Where did you get them; where were they?

A. The Third Officer went ashore and got them.

Q. And did they come aboard the ship?

A. Yes, sir.

Q. Now, about what time was that; do you have any record on that; was that 12:15?

A. It was after 12:15, after the leak occurred.

Q. Now, after they stopped the leak, did you do anything then; did you go down the hold?

A. Yes, I went down the hold, because a lot of oil had been thrown around by the leak, and cargo had been damaged.

Q. And what did you do down in the hold?

A. Inspected the cargo.

Q. Did you inspect the cargo just on the shelter deck?

A. No, the surveyor—or the ship's surveyor, Mr. Mallett, was on board, and they generally are to inspect our cargo [fol. 338] if there is any damage when we come in from our voyage. So Mr. Mallett and I went down to the hold and inspected the cargo in the shelter deck. And then we went down in the lower 'tween deck, took off some hatches in the fore part, where the ladder is, and went down there with flashlights and looked at the cargo where oil had come down through the hatches.

Q. Now, did you have a conversation with anybody after you examined that cargo?

A. Yes.

Q. With whom did you have that conversation?

A. Mr. Sexton.

Q. And what did you say to him and what did he say to you?

A. Well, I told him what I had mentioned before, to have always a man on board when the pump is working.

Q. What did he say?

A. Well, he didn't answer anything to that.

Q. Now, was Mr. Sexton on board at this time, on the ship itself?

A. He came on board when the leak occurred.

Q. Did you have any conversation with him about the cargo?

A. Yes, I wanted him to give me a signed statement that the El Dorado Oil Company, by their pump and crew, had caused damage to our cargo, which they were liable to.

Q. What did he say to that?

A. He refused.

Q. Now, after the leak was stopped, and after you had examined the cargo, what did you do then, after your conversation with Mr. Sexton?

A. Well, I told also to sweep the tank hold—the tank covers, where the crew was working on. And I offered to give them sand and sawdust to strew around the platform where they were working on, in order to minimize the danger of slipping in the oil.

[fol. 339] Q. How large a space did this oil cover that was down there?

A. Excuse me?

Q. How much space did this oil cover that was down there; how much oil did you lose, do you know?

A. I don't know. I don't know, but several barrels.

Q. And how much would there be in a barrel?

A. In a barrel is about 170 liter, which is, let's say, 50 gallon.

Q. Of course, when you left there this oil we have been talking about was still hot, was it?

A. That was hot; yes, sir.

Q. Now, then, when you went topside, what was the next time you heard of anything wrong in No. 3 hatch?

A. Well, Mr. Mallett and I, we were sitting up in the smoking salon and waiting for the oil to get discharged, because it took a very long time, and then the Third Officer came into the alleyway, thundered at my door to my cabin, which is beneath the smoking salon, and called in Norwegian, "Now a man fell into the tank." And we rushed out immediately.

Q. What did you do, did you help in the rescue?

A. I went for the crew, which was up. I cannot recall in that excitement what exactly my steps were, but I got hold of the crew, went on to the boat deck, threw off the lids from the lifeboats, got hold of boat hooks and ropes, and the rope was thrown down into the tank, and the boat hooks were lowered down onto the 'tween deck. And then I went ashore to get hold——

Q. Now, you talk about the crew. To whom do you refer, these two winchmen?

A. These two winchmen. They were on all night.

Q. Then after you did that, you went ashore?

A. Yes.

Q. And who did you see ashore?

[fol. 340] A. I didn't see anybody ashore before I came to Mr. Sexton's office.

Q. And what did you find there?

A. Mr. Sexton.

Q. Did you have a conversation with him?

A. Yes, I told him that one man fell into the tank.

Q. What did he say?

A. I asked him to come on board immediately. He refused. He said that he couldn't look at a man who had been involved in an accident.

Q. And did you have any other conversation with Mr. Sexton then?

A. Well, I told him that it was his duty, as a leader of work, to help his men as much as he could, accident or no accident.

Q. He didn't come aboard, though?

A. No, he did not come on board. I asked him for the stretcher, and he told me where the stretcher was. That was at the head of the pier, in a small office. And I went there, took the stretcher down and carried it on board.

Q. And is that the stretcher they used to take him off in?

A. That's right.

Q. Now, did you have any conversation with any of the pump crew that were on the ship right after the accident?

A. Yes.

Q. And whom did you have the conversation with?

A. The first witness who was on—not Mrs. Skovgaard, but the first witness who was after.

Q. The man there in the grey suit?

Mr. Donohue, will you stand up, please?

[Man in courtroom stands.]

A. That's right.

Q. And how did he tell you the accident happened?

A. He told me that Mr. Skovgaard, who was a main-
[fol. 341] tenance man, wanted to repair the pump——

Mr. Baker: I object.

Mr. Cunningham: I object to this. No foundation has been laid by asking Mr. Donohue whether or not he said something to this gentleman. At least, I don't recall it. Has there been a foundation laid for this?

Mr. Baker: No, no foundation laid. That is one of my objections.

Mr. O'Neill: I asked Mr. Donohue and Mr. Donohue's answers continually were, "I may have. I may have."

Mr. Cunningham: Well, if Mr. Donohue was asked whether or not he had a conversation with the Chief Officer, I will withdraw the objection. I don't recollect such a question being asked, but if Mr. O'Neill tells me he has, then in that event I will withdraw the objection.

The Court: I seem to recall that he did say so.

Mr. O'Neill: No, I didn't ask him that question, sir. I didn't ask him whether or not he had a conversation with the Chief Officer.

The Court: What did you ask him?

Mr. O'Neill: I asked him about several statements that were made. And I think your Honor will recall that Mr. Donohue said, "I may have said that."

The Court: I can settle that right away. I will call Mr. Donohue back to the stand, in the interests of justice, and find out if he spoke to him or not, if you're going to get ridiculous about this.

Mr. Donohue, will you stand up, please?

Mr. Donohue: Yes, sir.

[fol. 342] [Man in courtroom stands.]

The Court: Did you speak to this Captain that night?

Mr. Donohue: I don't recall it, sir.

The Court: You have no recollection of speaking to him at all?

Mr. Donohue: No, sir; not in the excitement.

The Court: Did you see him there?

Mr. Donohue: To tell you the truth, I don't remember. I know there was a Mate aboard the ship; whether I spoke to him, whether he was there at that moment, I don't remember.

Mr. Baker: I make an objection on the ground that it is improper.

The Court: Do you renew it?

Mr. Cunningham: Yes, no proper foundation laid for it.

Mr. O'Neill: Well, I think that is a proper foundation, sir. The man says he doesn't know. And we have in evidence here the log of the ship which refers to that very conversation.

Mr. Baker: Where?

By Mr. O'Neill:

Q. Did you make a note in your log book that you had had a conversation with somebody aboard the ship that night?

A. I have to read the log. It is three years since I wrote the log.

Q. Did you make an entry in that log referring to the conversation we are just talking about?

A. I have to read it.

The Court: Well, read it, Captain.

A. Yes, I made an entry about the conversation we had. I did not see the accident myself.

The Court: No, I understand.

[fol. 343] Mr. Baker: May we ask what the entry is? The log is in evidence.

The Court: Read the entry so we know what you put down.

Mr. Baker: What is the entry? It is in evidence.

The Witness: "The foreman for the pump gang, Carl Skovgaard, who was engaged in inspecting the electric pump, which was placed on the tank cover, which was laid across the tank trunk, fell down into the oil in the deep tank, which then was about eight feet above the bottom and 22 from the top of the tank. The reason that he fell was that he slid in the oil which had been spilled because the tank—on account of the leakage that had been caused."

Mr. Cunningham: Is the next statement——

The Witness: Yes. "The Chief Officer had called attention to that one had to scatter sawdust or sand on the tank cover before work was resumed."

The Court: Well, did they take advantage of your offer, did they take sand and whatever you offered them?

The Witness: The sawdust was given to the tank crew. It was none of my business to see whether they did it or not. But since they didn't have any sawdust down there, I gave it to them, which was not unusual to do, if anything like that happens, spilling oil on deck, or so. We always do that.

The Court: So you did give them the sand and sawdust?

The Witness: No, only sawdust.

The Court: And can you tell us whether they used it or not?

The Witness: I don't know. I didn't see it.

[fol. 344] The Court: You didn't see it. Well, you said that there was something in that log which reflects that you

spoke to Mr. Donohue, who seems to have no recollection of speaking to you that night.

The Witness: Well, I did not only speak with Mr. Donohue, I spoke with everybody who was down on the pier after the lifeless body of Mr. Skovgaard was landed there—Mr. Blaney and the other gentleman who was also down there.

The Court: Why are you so sure you spoke to Mr. Donohue?

The Witness: Because Mr. Donohue was the first one I saw.

The Court: He was the first one you saw?

The Witness: Yes.

The Court: After the tragedy?

The Witness: Yes.

By Mr. O'Neill:

Q. Now, did the crew have anything to do at all with this pump that they took aboard to get the oil out of the ship?

A. No.

Q. And how is the oil usually discharged from the ship, from the deep tank, on ships that you have been on?

A. Well, as Mr. Mallet already told, it is the first time I have seen cocoanut oil, or any kind of oil, being discharged with an electric pump. They usually use steam pumps. And when we discharge it we swing the tank lid, like it was done now—not we, but the tank crew usually swings it that way, or any way they want it placed, which is easy for them. Then they hook up their pump and start to pump. And after discharging gets less, they get less oil [fol. 345] out of the tank, they pick up that pump and lower it down into the tank, have it hanging in the wire and lower it down, so when the oil ever comes down the pump comes down, together. So finally, when there is nothing more left, only the bilges, the pump stands down in the bottom of the tank, and then they pump out the bilges.

Q. Have you ever seen it discharged through the manhole cover?

A. No, never, the deep tank. I have seen a wing tank, or a tunnel tank.

Q. Now, how deep are those wing and tunnel tanks?

A. They are eight foot, nine foot.

Q. Now, Mr. Folkman, will you take a look at that picture in front of you there, Respondent's Exhibit 2, and will you tell us where the pump was placed?

A. Well, the pump was placed fore and aft, off the tank lid—on the tank lid.

Q. Does that give——

A. This is about the correct position of the pump, and the suction line was coming around here, making a loop, going down into the tank, and the discharge line went up here and was expended through a saddle.

Q. Suspended?

A. Suspended, yes. The discharge line was not resting on the coaming, it was hanging, because of the vibration in the hose, it will easily cut over a sharp corner.

Q. Now, did this tank lid lap over onto the starboard tank?

A. No.

Q. There has been some talk here, Mr. Folkman, about the hatch beams. Are those two beams that are between the two tanks there—I think what we have been calling the coaming you referred to as the trunk, is that right?

A. Yes, that is the expansion trunk.

Q. Now, these two beams, just mark them with a "B", please.

[fol. 346] A. [Witness marks photograph.]

Q. Will you tell us where those beams belong, that is, what hatch?

A. They belong to the tank.

Q. They belong to the tank?

A. Yes.

Q. About how long are they?

A. Fourteen feet. The tank is about 14 feet in length.

Q. And they don't belong on the upper deck?

A. No. No, the upper deck is 22 across here.

Q. And your 'tween deck down here that we have been talking about, where you went down, that is also 22, isn't it?

A. Yes.

Q. And these hatch beams that we have there, when are they used in those deep tanks?

A. Well, when we carry dry cargo in the tanks, we don't use tank lids, we use hatch boards. And then we place these beams into these sockets. You see the sockets here. They are clearly visible in the tank.

Q. Mark "Soc" on that.

A. "Soc". [Witness marks photograph.] There is a socket also here, naturally. The beam goes right across the tank.

Q. And are these the hatch covers here where I have my finger?

A. Some of them are hatch covers, some of them are sealing. The sealing—I mean the bottom of the tank. When we carry dry cargo the bottom of the tank is covered by sealing walls.

Q. And why are those beams kept between those two tank trunks?

A. Well, that is to secure them. The ship is loaded with different commodities, in the 'tween deck, and when the ship comes out at sea and starts rolling it is a safe place to have them because they may come loose and smash a lot of cargo. And, besides, it is—on all the Wilhelmsen [fol. 347] ships—which are about the same as this, as the Tungus, and I have been in six of them—they have the same deep tanks—I have never carried those beams any other place than here. And, in fact, when the ship is delivered from the shipyard they are placed there.

Mr. O'Neill: That is all.

COLLOQUY

The Court: Hold it, Mr. Baker. You will be with him for a while, won't you; you will be cross examining him for a while?

Mr. Baker: Yes.

The Court: I think we will adjourn for lunch. Return at 2 o'clock.

[Noon recess.]

Afternoon Session

Mr. Cunningham: May we approach the bench, your Honor?

The Court: Yes, come up.

[Discussion at side bar off the record.]

Mr. Cunningham: With the consent of Mr. Baker and Mr. O'Neill I am now reading—out of turn, so that the lady from the New Jersey State Compensation Commission need not wait around—a record of the New Jersey Department of Labor & Industry, Division of Workmen's Compensation, involving a claim by Olga Skovgaard, the representative of Carl Skovgaard, deceased, against El Dorado Oil Company, at which time Mr. John J. Lemken appeared for Mrs. Skovgaard, and Cox & Walberg, by Arthur F. Mead, appeared for the respondent, El Dorado Oil Company.

At that time, which is August 4, 1953, the Deputy Director of Workmen's Compensation awarded to Mrs. Skov-
[fol. 348] gaard the total sum of $21,400 in workmen's compensation to be paid from the date of the incident involving her husband's death up until April 12, 1969, at a rate per week of $25.

Mr. Baker: I think the record should show, too, that out of any third-party recovery they would be entitled to the return of their compensation payments made.

Mr. O'Neill: Your Honor, we have worked out sort of an agreement on this contract. While we may prove more of it later, I think at this time, since we have been talking about it, I would like to read in one paragraph of the contract.

The Court: Is that agreed upon?

Mr. Cunningham: I have withdrawn my objection to this particular paragraph of the contract. Mr. O'Neill says he wants to prove only this and I have no objection to it.

The Court: Mr. Baker?

Mr. Baker: I would say this, that as between the respondent and the impleaded respondent, I have no interest, and they can certainly read it, as far as they are con-

cerned. But I still submit that it has no binding effect upon the libellant.

Mr. O'Neill: Well, sir, on that point of Mr. Baker's, I just made the reservation, it may be we will show later on in this case that El Dorado had in mind this contract in taking on this job of pumping. But at this moment, sir. I think we should get rid of the dispute we had up until now and put that behind us, and I would just like to read in Paragraph 7 for that reason.

"Oil to be loaded and discharged at sole risk and expense of shipper and/or consignee. All appliances for putting in and taking the oil out of the tank to be provided by ship-
[fol. 349] pers and/or consignees of the oil, vessel furnishing steam for discharge and/or heating coils as customary, if required. It is understood that the carriers agree to liquefy the oil before discharge, but such liquefaction shall be limited to the capacity of the coils available in the vessel, and said coils having been accepted as adequate by the surveyor employed by shippers prior to the loading operations. If additional heating other than that furnished by vessel's coils is required at discharge port, all expenses concerning such are to be borne by the consignee and/or owners of the oil. Also, should vessel steam outlets and consignee's pumps not fit, the consignee to provide the necessary fittings or else to provide the steam for operating their own pumps."

The Court: Are we through with the Captain?

Mr. O'Neill: Just direct. I think Mr. Baker would like a few questions.

The Court: Captain, will you resume the stand, please.

FINN FOLKMAN, resumed the stand.

Cross examination.

By Mr. Baker:

Q. You have been a Chief Officer for many years before the happening of this event?

A. That's right.

Q. And you are acquainted with your duties as Chief Officer?

A. Oh, yes.

Q. And would you tell us what your duties are as Chief Officer aboard a vessel?

A. Well, my duties are, first of all to look after the loading and discharging of the vessel, that the cargo is delivered to the ship in good condition, and is delivered at the port of discharge in the same condition as it is received.

Then my duties are to help the Captain with the ship's [fol. 350] navigation. I also have to look after the upkeep of the ship, that everything is in good condition—painting, the hull, the holds, the loading gear. And, naturally, I have the care of the crew in case of sickness, and so on.

That is roughly my duty aboard the ship.

Q. And what are your duties as Chief Officer with reference to the inspection of the vessel while it is in port, similar to this vessel that was in port at Bayonne?

A. Well, regular inspections of the ship are done every four years. That means that the ship is under—like the Tungus was on the Lloyd insurance, and they have their regular inspections where everything is inspected, the hull, and the ship's gear, and everything which concerns the ships.

But, naturally, also inspections are done by the Captain and me, concerning the ship's gear, that before—or prior to discharge or loading I will go over the entire gear. That is a visual inspection. I have no means to see inside the wire, or do any tests, stretching tests, or tests by fire, that we have no means to on board.

Q. So you are now talking about visual inspection——

A. That's right.

Q. —that you can see by your own eyes?

A. That's right.

Q. And when a ship like the Tungus was in the Port of Newark, during that period of time the vessel is under your jurisdiction, is it not?

A. Yes.

Q. Was the Master aboard the vessel after the Tungus arrived in Port Newark; did he stay aboard?

A. He stayed on board, yes.

Q. And was he there on board during this entire incident on December 5 and December 6 of 1952?

A. That's right.

[fol. 351] Q. And when the Master wasn't actively taking care of the vessel then it devolved upon you—the duties of taking care of the vessel?

A. Well, I mean everything concerning with the cargo is the Chief Officer's duty.

Q. So that it is entirely your duty as Chief Officer——

A. That's right.

Q. —concerning the cargo of the vessel?

A. What do you mean by cargo of the vessel?

The Court: Just what you mean. You said so.

A. Yes. I mean—yes, that's all right, that's the cargo of the vessel, that's true.

Q. Now, with reference to the inspection of the vessel while the vessel is docked in port, like it was docked here in Bayonne, did you conduct the inspections of the vessel, the visual inspections?

A. The visual inspections are done when the ship arrives, or before it arrives in port, because then we rig up our gear, not after the ship is docked. Then the gear is rigged, so it would not be possible to make any inspections then.

Q. Well, then, before the ship gets into the Port of Newark—in Bayonne, rather—then you made your visual inspections?

A. Before we came into New York, when the ship was at sea, before we were docked in New York. After that our derricks were never lowered, so I could not do any inspection worth while.

Q. Now, with reference to the inspection of the vessel, throughout the vessel, while it is docked in Bayonne, do you take care of that, the visual inspections, isn't that your duty?

A. I did not do any inspections after we left Barber Line pier until we came to Bayonne. That is only a matter of a couple of hours, or not so much.

[fol. 352] Q. Well, while a vessel is docked—this vessel is docked anywhere—is it not your job as Chief Officer to

make whatever inspections are necessary of the entire vessel, visual inspections?

A. When the ship was shifted from the Barber Line pier, Pier 36, to Bayonne, that is not a sea voyage. The ship was going over there, shifted by tugs, tugs accompanied us, and I was standing on the forecastle head where I had to be.

Q. Now, may I ask you this. At all times, any visual inspections, isn't it your job as Chief Officer to make them?

A. Visual inspections, that's right.

Q. And those visual inspections it is your job to do even while the vessel is being unloaded of a cargo, isn't that so?

A. I can't make any visual inspection of the ship's gear while the ship is discharged.

Q. I am not talking about just gear, any part of the vessel.

A. Well, for instance?

Mr. O'Neill: Why don't we limit it? I think the Chief Officer—there may be some difficulty here. The Chief Officer said he inspected the ship before she came in, he put her derricks in position, and then they were using them. So from that point on there is nothing you can do, they are using the gear at that time. Mr. Baker keeps asking if he doesn't inspect it, and the Chief Officer told him he can't do it while it is being used.

The Court: That is what I understood him to say. Are you trying to find out whether there are regular tours of inspection, how often?

Mr. Baker: I am trying to lead to that, Judge.

The Court: Ask him straight, will you, without beating [fol. 353] around the bush.

By Mr. Baker:

Q. Do you make tours of inspection, looking over the entire vessel, as Chief Officer?

A. While we are in port?

Q. Yes.

A. Well, I am going around the ship, looking in the hatches, and see that the cargo is discharged properly.

Q. And do you look around the decks of the vessel to see that everything is all right?

A. Oh, yes.

Q. And how often do you make those tours of inspection while the ship is in port?

A. I would say at least once an hour.

Q. And do you make that yourself, or do you make that in company with somebody else on the ship?

A. I make that myself.

Q. And that is part of your job, isn't it?

A. I wouldn't say that it is part of my job, but I consider it my duty.

Q. And you make these inspections, as you say, about once an hour; even though there are unloading operations going on?

A. Surely.

Q. That is your duty.

A. My duty.

Q. And if you saw any unsafe conditions during that tour of inspection is it your duty to see that they are corrected?

A. As long as it is ship's gear that is involved, it is my duty.

Q. If you saw unsafe conditions about, say, the deck?

A. That belongs to the ship.

Q. That belongs to the ship.

A. The deck belongs to the ship.

Q. And it is your duty to correct them?

A. That's right.

[fol. 354] Q. If you saw any unsafe conditions which might cause injury to anybody aboard the vessel, is it your duty to do something about them?

A. As long as it is possible, yes.

Q. And that's your job and duty, isn't that right?

A. That's right.

Q. And if you saw any oil about the deck of the vessel, is it your duty to do something about it?

A. Do you now talk about oil discharge or do you talk about general cargo discharge?

Q. Any oil, about any part of the vessel?

A. But we have not any oil in any part of the vessel, we only have it in our tanks.

Q. You never have oil on the deck?

A. No.

Q. But if you saw—if you saw oil——

Mr. O'Neill: I object.

Q. —on the deck, and you saw that during the time you were inspecting it, what is your duty?

The Court: Just a minute. What is the objection?

Mr. O'Neill: My objection is that he says he doesn't have oil on the deck.

The Court: He is asking him if there was oil on the deck. He is not saying there is, but if there was oil on the deck, he would like to know whose duty it is to correct the situation.

Mr. O'Neill: On what deck?

The Court: Do you understand the question?

The Witness: Yes, I understand the question perfectly well.

A. That depended entirely on whose duty it was, or which contract the stevedore discharged under, and who soiled the oil. If it was the ship's crew, certainly it was [fol. 355] the ship's crew's duty to take it off. But if it was the stevedore who soiled the oil, it was the stevedore's duty, not the ship's duty.

Q. So that you make a distinguishment there that you would have the oil corrected if it was dropped by the crew, but if it was dropped by somebody else you wouldn't have it corrected?

A. No, I——

Mr. O'Neill: He didn't say that.

The Court: He didn't say that at all, Mr. Baker. That is not a fair thing to say.

Mr. Baker: I thought he said that.

The Court: No, he did not. He said if the stevedores caused the condition, it would be their duty.

The Witness: Not mine.

By Mr. Baker:

Q. So that what you do about it, if you saw oil there which you just said if it was dropped or caused by stevedores, what would you do?

A. I would bring it to the notice of the foreman.

Q. You would bring it to their attention?

A. That's true.

Q. But you certainly wouldn't forget about it, would you; you would do something about it?

A. Would forget about it?

Q. You would bring it to somebody's attention?

A. Yes, surely I would.

Q. And it is your duty to see it is corrected; no matter who does it, it's corrected, isn't that so?

A. I guess so, if I brought it to the notice of the foreman who knew his job, he would do it. He wouldn't let oil stand around.

Q. And it is your duty to see that those unsafe conditions [fol. 356] don't continue to exist, isn't that so?

A. The foreman's duty of the stevedores it was, not mine, after the stevedore—I brought it to his notice.

Q. But it is your duty to see that something is done, that these unsafe conditions are corrected.

The Court: Well, we can't record that answer, can we?

Mr. Baker: What did he answer?

The Court: He didn't answer at all. He made a gesture with his hand.

Q. Can we have the answer to that?

A. What do you want?

The Court: The answer. Suppose you called it to the attention of the person in charge of the stevedoring, assuming that there was a dangerous condition on your boat——

The Witness: That's right.

The Court: —and he didn't do it, what would be done about it?

The Witness: If I had a crew on board the ship at that time who could do it, I would, and if he had the means to do it, if he had the equipment.

The Court: Then who should do it, if you had the equipment, the other people, the stevedores?

The Witness: Well, I guess during oil discharge that also the oil crew has their necessary equipment to sweep oil, especially if they discharge tanks, because the sides of the tanks, and the decks in the tank have to be swept down.

The Court: And who does that?

The Witness: The oil people.

The Court: And when the oil people get through with [fol. 357] the job do they have to leave it clean, the way it was before?

The Witness: I guess the oil company will sweep up all oil, because it is very valuable, and they will leave the tank absolutely clean as possible.

The Court: Now, suppose there was a leak, as you had in this case—let's talk about this case——

The Witness: Yes.

The Court: —and this oil squirted out of this broken nipple.

The Witness: Yes.

The Court: Whose duty was it to clean that oil off?

The Witness: The oil company's. I suppose they wanted to salvage the oil. It was not a matter of drops, it was a matter of many barrels.

By Mr. Baker:

Q. And do you carry—generally speaking, do you carry sand and sawdust on board the vessel?

A. Yes, always.

Q. Always?

A. Yes.

Q. And what is the purpose of carrying sand aboard the vessel?

A. We carry sand to scrub our decks.

Q. What is the purpose of carrying sawdust aboard the vessel?

A. To clean our holds. We carry always coal on the way out, and we sweep our holds with sawdust then, in order to get most of the coal dust out of the holds.

Q. And what is the best way of cleaning oil from the deck of a vessel?

Mr. O'Neill: Let's limit it.

A. That I would not know. I am not an expert in oil.

[fol. 358] The Court: Don't all talk at one time. The court reporter can't get it.

When you hear your lawyer get up and start talking, you be quiet.

Mr. O'Neill: I object to that unless we have the kind of oil that Mr. Baker has in mind. Because we have oil on the main deck, and we have oil in the shelter deck.

The Court: You think the question is too general?

Mr. O'Neill: I think so, because there have been some of them here saying that this oil solidified. Now, we don't ordinarily have oil that solidifies, and this oil solidifies at a certain temperature. So I think we should limit it to the particular subject that we are dealing with here, sir.

The Court: Let's limit it to our oil, Mr. Baker.

Mr. Baker: I would like to first ask about general oil, for reasons I will explain to the Court.

Q. Any type of oil, just general oil, do you use sawdust for that?

Mr. O'Neill: Just a moment. Do you mean machine oil?

Mr. Baker: Any kind of oil.

A. Well, I would advise to use a rag. It depends on the amount of oil which is on deck. But if it is not a great amount of oil I would advise to take rags.

Q. How about sawdust, when do you use sawdust on oil?

A. After it is taken up you have sawdust on it, not to slip.

Q. And, therefore, when the oil is cleaned you consider it advisable and safe to put sawdust there, is that so?

A. In any event, I would consider it safer to have saw-[fol. 359] dust on oil instead of having nothing.

Q. And that applies to either general oil or it applies to cocoanut oil, doesn't it?

A. It probably applies to any kind of oil.

Q. And that is why sawdust is carried on a ship, to take care of those contingencies?

Mr. O'Neill: I object to that, sir.

The Court: He is an intelligent witness. He said no.

A. No., I told you before.

The Court: You told us why it is carried. Don't repeat it.

By Mr. Baker:

Q. Shouldn't a ship carry sawdust?

A. No.

Q. It shouldn't carry it?

A. No.

Q. Did this ship carry sawdust, on the date——

A. Yes, it did.

The Court: He told you. He even suggested that they used it.

The Witness: But I order all storage on board the ship.

Q. Where was the sawdust that they carried?

A. It was in the forepeak hatch.

Q. And you remember that, do you?

A. Yes.

The Court: What is a forepeak hatch?

The Witness: The forepeak is a storage room that is in the fore part of the ship.

The Court: A storage room?

The Witness: Where we keep our stores, yes.

Q. And you definitely remember that?

A. Yes.

Q. And you considered it the duty of the vessel to carry [fol. 360] sawdust?

A. I order all the stores on board the ship, and since we carry coal on our outward voyage, and I have to do the cleaning of the holds, I have found it better to use sawdust instead of only sweeping the coaldust. We use water on the sawdust to make it more clear, in order to keep the dust of the coal down.

Q. And did you know Captain Nilsen?

A. Yes, he was the Captain of the vessel.

Q. And did you speak to Captain Nilsen about the question of the sawdust on the vessel?

A. No, I never did.

Q. Did you read this deposition that was taken of Captain Nilsen?

A. No.

Q. At no time?

A. No time.

Q. And if I told you that in his deposition he said——

The Court: Just a minute. Do you know what a deposition is?

The Witness: No.

The Court: Well, why do you answer the question? Why don't you say that you don't know what a deposition is?

The Witness: I thought he meant whether I had read that extract of Captain Nilsen.

The Court: That's what it is.

The Witness: I gathered so much.

The Court: The sworn testimony of Captain Nilsen.

The Witness: Yes.

Mr. Watson: The page?

Mr. Baker: Page 40.

Q. He was asked the question, "And when sawdust is carried on the vessel, for what purpose is it carried?"

And he answered, "Well, we use sawdust to put in the [fol. 361] hold, if it is wet down there, to dry up.

"Question: To dry up what?

"Answer: The water. If it is raining we put down sawdust to dry up that water, and if oil is spilled we put it down there to dry up the oil."

Isn't that the reason you have sawdust aboard the vessel?

A. Well, I am the Chief Officer of the ship, Captain Nilsen is the Captain, and I am in charge of the loading and the discharging of the ship, not Captain Nilsen. I am only giving him a general idea, or if he asks me how the ship is loaded, and what we do, I will tell Captain Nilsen.

But I am not asking Captain Nilsen how the ship is loaded, and what I do to clean the holds.

Q. You disagree with what Captain Nilsen said here?

A. Yes, to the sawdust, I do.

Q. And on page 42 we asked him, "Question: Would there be any record that you can refer to, to tell us whether the vessel carried sawdust at that time?

"Answer: The ship didn't carry sawdust. I didn't know anything about it, but she carried sand.

"Question: You say that the 'MV' Tungus didn't carry sawdust?

"Answer: I said I didn't know. I can't tell now after all these years."

A. Well, now he made it plain. He didn't know.

Q. And you know?

A. I know.

Q. So that the Captain didn't know whether they carried sawdust, but you remember?

A. I remember it. Those are things which are in my charge, not under the Captain.

Q. Now, you saw, did you not, that there were hatch beams in between these hatches?

A. Yes, that's right.

[fol. 362] Q. And you knew that before this accident occurred, that those hatch beams had been placed there by the ship, between the two hatches?

A. Yes, naturally.

Q. When were they placed there, could you tell us?

A. I should say before I came on board the ship.

Q. When was that?

A. Well, it was a year prior to the discharging.

Q. So that it had been there for a whole year?

A. Oh, yes.

Q. And that belongs, you say, in these two holes when they use it for dry cargo?

A. That's right.

Q. And when they are not using it for dry cargo they don't need those hatch beams at all, do they?

A. No.

Q. Now, these hatch boards, these wooden hatch boards, that is only used for dry cargo, too, isn't that so?

A. That's true.

Q. And when they were taken off the hatches they were put out of the way, weren't they, they were put away out here, over here [indicating]?

A. Yes, that's right.

Q. Now, they are right next to the bulkhead aft of the vessel?

A. This is the engine casing, what you see here.

Q. Yes. And that's some of the hatch boards on one side and some of the hatch boards on the other side?

A. Yes.

Q. They are out of the way there, aren't they?

A. Oh, yes.

Q. And these iron beams were left right in between the hatches?

A. That's true.

Q. Now, you knew that the men from the oil company were going to come aboard to pump out this oil?

A. Yes.

Q. And you knew they were going to work and walk in [fol. 363] that entire vicinity?

A. I didn't know beforehand where they were going to walk, naturally, but I imagine they were working on the tank.

Q. And you knew they were going to work and walk around these various vicinities?

A. I don't know that beforehand, but, as I said, I know that they work with the pump at the tank; where they walk, I don't know.

Q. But you knew they were going to work around here, around these hatches, the port hatch——

A. Why around the hatch? Around the pump.

Q. Around this port tank; you knew they were going to work there?

A. Yes, but not around the hatch. They have no business in the after part of the tank.

Q. And you saw them walking about the various parts of the tank?

A. I did not see them walking around, I was not standing constantly at No. 3 hatch, looking down and see how the men walk.

Q. Did you see them walking around these tanks?

A. I did not.

Q. You saw them walking around near the pump, anyway, didn't you?

A. When I looked down in the hatch, as I already mentioned before, I only saw the tank crew, when they rigged the hatch, and placed the pump, connected the lines, and started to pump. To my belief—or what I saw, actually saw—when I looked down in the hatch I never saw a man from the pump crew down there at all.

Q. You didn't see any of the pump men—from the oil company down at the 'tween deck at all, the shelter deck?

A. Not as long as the pumping commenced, normally.

The Court: Didn't you hear him say that before, he had to go looking for the crew men twice upstairs. There was no standby there then, was there?

[fol. 364] The Witness: No, there was no standby men there.

The Court: In other words, the pump was unattended?

The Witness: The pump was unattended, exactly.

The Court: You have seen many of these operations, haven't you?

The Witness: Many, since I was a boy.

The Court: Is it customary to leave a pump unattended while it is working?

The Witness: I have never seen it.

The Court: I didn't think so. I am only a layman.

The Witness: We carry oil on the ship; I know. But I have never seen any pump unattended.

By Mr. Baker:

Q. Now, when was the first time you say that you noticed the leak commenced, what time was that about?

A. I was called——

The Court: Wait. He wouldn't know when it commenced he would only know when he first saw it leak.

A. I was called when the leak—I mean when the line had broken off. And then I came on deck.

Q. What time was that?

A. That was, according—I have written the log, and I do—at 12:15 I think it was.

Q. Now, did you say before that it was around 9 o'clock that night that you first observed that there was something wrong with the pump?

A. Yes, that's right.

Q. That was 9 o'clock?

A. Nine o'clock.

Q. And at that time what did you observe that was wrong?

Mr. O'Neill: Pardon me. He didn't say he observed it. He said it was reported to him by somebody.

Mr. Baker: Let's correct that.

[fol. 365] Q. Did you see it or was it just reported to you?

A. It was reported to me by the Second Mate.

Q. By the Second Mate. And what was it that he reported at 9 o'clock that night?

A. He reported that there must be something wrong with the pump. And I asked him is anybody down there. "No," he said, "there is nobody on board."

Q. Did you then go down to the shelter deck to see what was going on?

A. Why should I do that?

Q. I am just asking you.

A. No. I have no idea about pumps, and things like that, but I—I went ashore to get hold of the men.

Q. And did you look then to see what was going on, or didn't you look?

A. The main thing to my opinion then was to get hold of somebody who could do something about it.

Q. Then you didn't look then, is that it?

A. No.

Q. So you can't tell us whether it was spouting oil at that time?

A. No, no. But I am sure the Second Mate would have told me if there had been anything which could damage the cargo.

Q. All right. Now, when was it that you first observed that there was oil spouting out of the pump, or the pump lines, about?

A. After the big leak occurred.

Q. When was that about? Could you give us a time?

A. 12:15.

Q. And you saw the oil coming all over the decks and over the hatch lids?

A. Well, it was spurting up, high up, and fell down, in a spray.

Q. And you saw the oil also, at that time, over these tank lids?

A. Yes, they were covered.

Q. Over the hatch beams that were between the tank lids?

[fol. 366] A. Probably over all—in the sides here we had cargo; fore and aft here, to the fore part of the tank, we carried lumber, mahogany lumber; and on top of that we had plywood; and in the fore part here, desiccated cocoanut, in paper bags; and in the lower hold we had different commodities, like porcelain, lumber, and things like that.

The Court: There was oil all over the place?

The Witness: Was oil all over the place.

By Mr. Baker:

Q. And you were concerned with your cargo then, weren't you?

A. I was concerned with my cargo, but not with the oil so much, but to the damage of the general cargo.

Q. And you were also concerned with the safety of the men, of the oil company, that may be working around there?

A. No, I wasn't.

Q. Well, didn't you say before that you felt that the oil would be sort of—what were the words you used?—that you wanted to minimize the danger of slipping in oil?

A. Yes, I think it is minimized—if there is oil. We were talking generally about oil then, I guess, when I made that statement, wasn't it?

Q. And you indicated that you told Sexton to sweep the tank covers in order to minimize the danger of slipping in oil.

A. Sexton wasn't on board when you are talking about now.

Q. I thought that that is what you said.

A. It is your examination now, not what I said before, but your examination. You asked me whether I saw oil around the tank.

Q. Yes.

A. Yes, I did.

Q. And you felt that in addition to protecting your cargo, which you were concerned with, you also wanted to protect [fol. 367] the men who might be working around there, and you wanted to minimize the danger of slipping in the oil, and therefore you told somebody to do something?

A. Not somebody. I had to tell, as I said before, the foreman. And the foreman was Mr. Sexton. But Mr. Sexton was not around then.

Q. But at that time you recognized the danger of any of these workmen who might slip in that oil in that vicinity, did you not?

A. The tank crew is working in the tanks, they are equipped to work in the oil, they have to go down in the tank. What you imply is that I also had always the danger of working in the tank. It is a danger, but we cannot put sawdust in that oil, because the oil has to be salvaged before anything can be done.

Q. I am talking about the oil which had spilled around the tank lids, and the hatch beams, in that vicinity.

A. Yes.

Q. I am asking whether or not you recognized at that time the danger of a person slipping in that oil?

A. If I recognized it, it wasn't my business to do anything about it. It was the oil crew's business.

Q. But you did do something about it, didn't you?

A. I personally did not.

Q. Didn't you tell somebody something about it?

A. I told Mr. Sexton.

Q. And you told him what?

A. I told him first what I said before, I brought to his notice this damage of the cargo, and then I told him to sweep the tank lids.

Q. And when you told him to sweep the tank lids, you told him to use sawdust or sand, isn't that right?

A. I did not. I said I offered to give him sawdust or sand, which was done. Sawdust was given to them.

[fol. 368] The Court: Well, do they usually salvage the oil that is up on the deck and everyplace else?

The Witness: Oh, yes, your Honor. It is very valuable, and any spoil of this oil will be picked up and taken ashore. They scrape the tanks afterwards and take that ashore. I mean I have to be on board when the tank is empty to get stated from the surveyor that the cargo is discharged. There is no sweeping then.

By Mr. Baker:

Q. And your duty there as Chief Officer on situations like this, when there is this oil spill, is to protect the cargo, is it not?

A. The general cargo, yes.

Q. And it is to protect any persons aboard, too, from injury?

A. My crew, and nobody else. Protect, yes, as long as ship's gear is concerned. But this is not ship's gear you are talking about. This is the oil company's pump. It is not ship's gear.

Q. These tank lids and this hatch beam, that belongs to the oil company?

A. No, that belongs to the ship, but may I——

Q. And to protect——

A. Yes.

Q. —anyone from slipping on there?

A. Yes.

Q. Isn't that just as much a duty, to protect people, as well as to protect cargo?

A. But I have discharged many, many times oil cargoes and I have always experienced that any oil crew coming on board the ship has all the equipment to their own safety.

Q. You mean they bring sawdust aboard?

A. Yes, they can do that, too.

Q. Well, when you spoke to Mr. Sexton did you ask him whether or not he had sawdust aboard?

A. Mr. Sexton only told me to mind my own business.

[fol. 369] Q. Well, did you tell him that you had sawdust and sand aboard?

A. It is true that it was not my business. Mr. Sexton was entirely correct to tell me. But after that, after he stated that he did not want any help from me, or the ship, my duty was off.

Q. So that you offered him your sawdust in the vessel and your sand in the vessel?

A. I offered him sawdust or sand, I did.

Q. And you had that aboard the vessel?

A. I had.

The Court: Don't repeat that again.

Mr. Baker: All right.

Q. Now, in your log entry you have got it in there, have you not, that the ship's officer—the ship's Chief Officer had called attention to that one had to scatter sawdust or sand on the tank cover before work was resumed, is that right?

A. Yes.

Q. And you made that entry?

A. I made that entry.

Q. You didn't say that he has to put this sawdust, you said "one".

A. The oil crew I mean by it. You know, this is—may I only say one word to that. You take the translation from Norwegian into English, that is a commonplace we use in Norway—one. But if I wanted to say in my log any special person concerning the ship I would have said the "ship" has to scatter.

Q. And if you wanted to say a special person like Mr. Sexton, or the oil company, you would have said a special word, too, wouldn't you?

A. No.

Q. Couldn't you say that "he" or the "oil company" had to scatter sawdust?

A. But the contract has been read here, the certain para-

graph, that it is the oil company's duty to discharge the ship, in all means, not the ship's.

Q. But when you made this entry in the log book, which [fol. 370] was right on the same day, or the next day, when this accident took place in 1952, you didn't know anything about what the contract said, did you?

A. Why not? The Captain shows me the contract when it comes on board.

Q. And you read the contract before you——

A. Yes.

Q. —do your duties?

A. I do. That is my duty.

Q. And for the cleaning of this oil that was on this deck, when you spoke to whoever you spoke to, and you said it was Mr. Sexton, you felt that it was necessary to have sand or sawdust on?

A. I felt that Mr. Sexton, as a foreman, should know that. But since I wasn't sure that he knew anything about it, I brought it to his notice.

Mr. Cunningham: I didn't hear that answer.

Mr. O'Neill: I move to strike it.

[Record read.]

Mr. Baker: That is all.

Cross examination.

By Mr. Cunningham:

Q. I want to make sure I pronounce your name correctly. Is it Folkman?

A. That's right.

Q. Mr. Folkman, you were at pier—when I say "you" I mean the Tungus was at Pier 38, Brooklyn, before you went over to Bayonne to the El Dorado pier, is that right?

A. Yes.

Q. Did you discharge any cargo from the No. 3 hold at Pier 38 in Brooklyn?

A. Yes.

Q. Was that cargo located on the tank lids?

A. It is three years since I did it. I cannot remember.

Q. Well, at any rate, when the vessel left its last loading port it did have cargo which was loaded on to the tank lids, is that correct?

A. Yes.

[fol. 371] Q. And when she came into Bayonne that cargo had been discharged?

A. Yes, there was no cargo on there.

Q. How many discharge ports did you reach before Bayonne?

A. We went to San Francisco, San Pedro, Cristobal and New York.

Q. And can you remember now, after that recitation, where this cargo was removed from the tank lids of No. 3?

A. I cannot.

Q. Well, after you were finished unloading the No. 3 hold in Brooklyn did you then cover up the main deck with hatches?

A. I cannot remember whether the top deck was covered, but I—well, I cannot remember.

Q. It may be that when you arrived in Bayonne the main deck of the No. 3 hold had already been open and was open, is that correct?

A. It may be, yes.

Q. So that when you testified that you saw the hatch beams being taken off at Bayonne, you may have been incorrect, is that correct?

A. No, I would say—I think it was raining that night. That can easily be found out in the log.

Q. Fine; if it is available in the log, please tell us, because the log is in evidence.

A. Not in this log.

Q. You may refer to the log any time you want.

A. Not in this log, but we have a photograph——

The Court: Photostat.

A. —a photostat of my log, which I wrote.

Q. You kept a log besides the log which is referred to in evidence as——

A. Yes.

Q. —as Respondent's——

A. I mean my own log.

Q. Wait till I finish.

—in evidence as Respondent's Exhibit 6; there is another [fol. 372] log; there is another log besides this Respondent's Exhibit 6?

A. Yes. It is not original.

Q. Mr. Watson tells me that probably what you mean is that the Weather Bureau entries have not been translated.

A. No, probably not. But I have it there.

Q. Now, referring to the original—or, rather, the photostat of the original log, can you tell us whether there is anything in there which would refresh your memory as to whether or not the main deck beams and covers were on when you came into Bayonne?

A. It was on the fifth. [Examining document.] The last entry, (D), it was overcast. I cannot see whether it rained, but since it was overcase, (sic) insofar as—I think the hatches were on, because we had—I can state—I would say for sure, since it was desiccated cocoanut in both sides, and cargo in the holds, we would never have gone over with close hatches. We would have the hatches up—the top deck on.

Mr. Cunningham: Would you mark this for identification.

The Court: When you say you would have the top deck on, what does that mean?

The Witness: Covered.

The Court: Oh, that would all be covered, that area?

The Witness: Yes.

By Mr. Cunningham:

Q. Now, the men who actually covered the main deck before you left Brooklyn, as your memory has been refreshed, they were members of the ship's crew, of course?

A. Stevedores.

Q. They covered the top deck?

A. Yes.

Q. And when you arrived in Bayonne were there stevedores who took off the hatch covers?

A. No, our crew.

[fol. 373] Q. Your crew did it?

A. Yes.

Q. And your crew, therefore, operated the winches, and they also used—were the men who were actually on the covers and taking them off?

A. Yes.

Q. How many men were used in that operation, can you recall?

A. Two men.

Q. Well, how many men in the winches?

A. Two men at the winches.

Q. How many men actually handling the covers and beams?

A. Well, first, these two men take off the hatches. That's very easy. We never use more.

Q. Just a moment. Do you mean that the wooden hatch covers for the main deck are removed without the aid of the winches?

A. Yes.

Q. Now, when the hatch covers are removed there is nobody working the winches?

A. No.

Q. All right. But when the beams are removed, which are the large strongbacks, when they are removed, there are two men at the winches, and there are how many men attaching the cargo hooks to the strongbacks?

A. Well, the winchmen, they may attach—or one of the winchmen may help the officer on watch to attach the bridle, and then he goes to the winch, and they lift it, and they take it over, and the Second Officer on watch, generally, if he don't have any more to do, steers the thing down and they put it down.

Q. So that from your recollection there were two men and the Second Officer working on the strongbacks?

A. Yes.

Q. Were you there supervising that operation?

A. No.

Q. You didn't see it occur. Did you see it occur?

A. I may, I may not, I can't recollect. Three years I [fol. 374] cannot—such things—I did not know it would be a lawsuit.

Q. We understand that, Mr. Folkman. What we are trying to find out is whether or not you can testify now that you saw these strongbacks being taken off and put on the main deck.

A. I can testify that the long beams were laying on deck.

Q. No, we want to find out whether you saw them being taken off that night and being put on the——

A. No, I cannot say that.

The Clerk: RI-1 for identification, photostat of original log.

[Marked Exhibit RI-1 for identification.]

By Mr. Cunningham:

Q. Now, after the strongbacks, or hatch beams from the main deck were removed, then was the same bridle which was used to take off the strongbacks used to remove the tank lids in the shelter deck?

A. That is a special bridle.

Q. Now, do you know whether or not it was the same two men who operated the winch who went down to the shelter deck to take off the lugs or nuts which secured the tank lid?

A. Only four nuts on the tank lid.

Q. Tell me, were they the same men who went down and did it who were working on the winches?

A. I cannot recollect. I can't remember that.

Q. They may have been other members of the crew, is that correct?

A. Not other members of the crew, but they may have been the pump crew.

Q. Now, what you are telling me, that the pump crew were the ones who took off the nuts on the lid before the lid was lifted by the bridle and the winches?

A. That's usual.

Q. No, did you see it done?

[fol. 375] A. I might have seen it. These are small things I can't remember.

Q. I am not satisfied with what might have been. I want to know whether you saw it.

A. I cannot remember. These are small things. I can't remember it.

Q. So you don't know actually who took off the lugs from the tank lid; is that a fair statement?

A. I'd say positive that it was not the crew, because the crew had nothing to do with it.

Q. No, no. We are trying to find out what you actually saw, sir.

The Court: He apparently doesn't know who took them off. But he says he knows it was not the crew men, is that right?

The Witness: Yes, that's right.

By Mr. Cunningham:

Q. From your recollection then there were only two crew men who operated the winches and the Third Officer who were on duty around No. 3 hatch?

A. The Second Officer.

Q. The Second Officer. I am sorry.

—and the Second Officer who were on duty around No. 3 hatch that evening?

A. Yes.

Q. Do you know whether or not it was the ship's bridle which was used?

A. Ship's bridle.

Q. Would you describe the bridle for his Honor, particularly the one that was used to take up this tank lid?

A. Well, the bridle is a piece with a round ring. From that round ring are four wires, with another ring—you would call it a ring—and those are shackled to these bolts, these ring bolts, which are on the tank lid. And that again is connected to the wire which runs to the winch.

Q. Up through the toe of the boom and down to the winch?

[fol. 376] A. Yes.

Q. Did you testify, sir, on direct examination that the ship loaned certain employees to El Dorado to be used in the taking off of this tank lid?

A. Not loaned.

Q. Well, did you say that some of the ship's crew were used in an operation for El Dorado?

A. To drive the winches, yes.

Q. Oh, you mean these members of the ship's crew were not actually working for the ship when they were driving the winches; is that what you mean?

A. They are paid by the ship, overtime.

Q. And who directs their activities; the Second Officer, doesn't he?

A. I said, as far as I know—as a matter of courtesy, I said.

Q. Will you answer my question as to whether or not the Second Officer directs their activities when they are operating the winch?

A. The Second Officer directs their activity, but I said the Second Officer is directed by the oil crew which is in the hatch.

Q. Now, were you there when anyone from El Dorado directed the Second Officer?

A. Yes, I was.

Q. And can you tell me who it was?

A. I don't know the names. I never knew the names before they were mentioned in court.

Q. Well, now, you mentioned the name of Sexton as being the one, as I recall, on direct examination—when did you find out what his name was?

A. He came on board and——

Q. Did you know his name at the time?

A. Well, he told me his name when he comes on board.

Q. Was this the man who told you his name was Sexton who ordered or directed the Second Officer as to what to do [fol. 377] with the tank lid?

A. No, not Sexton.

Q. Oh, it was someone else?

A. Yes.

Q. Well, do you recognize that person as being here in court?

A. Yes, I do.

Q. Would you ask him to stand up? Will you tell me who it is and I will ask him to stand up.

The Court: The one who stood up before?

A. I recognize two men sitting over there which were down there.

Q. No, we are interested in the man now whom you saw —rather, who you saw direct the Second Officer as to the operation of the winch in taking off the tank lids.

A. Well, the actual directing, after three years, I could not recollect. But I saw one man directing him.

Q. You don't know who it is?

A. One of the oil crew.

Q. You can't pick him out now?

A. One of the oil crew, certainly.

Q. It was not Mr. Sexton?

A. Not Mr. Sexton.

Q. Do you recognize Mr. Sexton as being in court?

A. I do.

Q. Will you ask Mr. Sexton to stand?

A. Well, he didn't direct it. Yes. Mr. Sexton is the second—sitting beside the witness who was first.

Mr. Cunningham: Mr. Sexton, will you stand, please?

[Man in courtroom stands.]

Q. Is that the man who was directing the Second Officer as to the operation of the winches?

A. No, not Mr. Sexton. I said that.

Mr. Cunningham: Thank you, Mr. Sexton.

By Mr. Cunningham:

[fol. 378] Q. Now, do you testify, sir, that at 9 o'clock the Second Officer came to you and told you that there was an oil leak in the pump?

A. No, I did not. I said around nine; and there was something wrong, I said, with the pump.

Q. What did he tell you, if you recall?

A. As far as I remember, he said there is something wrong with the pump.

Q. You don't know what it was?

A. I can't recollect exactly.

Q. And did you go off the ship then to get someone?

A. Yes.

Q. From the pump crew?

A. I did.

Q. And where did you go?

A. I walked around until I found Mr. Sexton's office.

Q. And did you tell him that there was something wrong with the pump?

A. That's right. I told him to send a man on board, to have a man always there when the pump is in operation.

Q. You didn't know what was wrong with the pump at that time?

A. No, why should I? It wasn't my business.

Mr. Cunningham: I don't want to argue with Mr. Folkman.

The Court: He didn't ask you why should you, he just asked you if you know what was wrong with the pump.

The Witness: No.

The Court: You told me before that someone told you that the bearing was burning and the pump was smoking. Who told you that?

The Witness: Well——

The Court: You report that incident as happening at 9 o'clock.

[fol. 379] The Witness: Yes.

The Court: Who told you that the bearing was smoking?

The Witness: Well, the Second Officer must have told me.

Mr. Cunningham: Now, please.

The Court: If you know.

The Witness: Well, nobody else was around. It had to be him.

By Mr. Cunningham:

Q. Now, has your memory been refreshed by something that happened in the last few minutes——

A. No.

Q. —as to what the Second Officer told you was wrong with the pump?

A. No, no, exactly not, but I know that the bearing—there was something wrong about the bearing later on.

Q. Didn't you tell me a moment ago that you didn't remember what the Second Officer told you was wrong with the pump; did you tell me that a moment ago?

A. Yes, I did.

The Court: That's right, he did.

Q. Did you tell me a moment ago that you went to see Mr. Sexton and you told him that there was something wrong with the pump, and you couldn't remember what you told him was wrong with the pump?

A. I did.

Q. Now, you remained on the ship from 9 o'clock on, didn't you?

A. I was on the ship always—I mean, only when I went ashore after Mr. Sexton.

Q. And the next time that you were told that there was anything wrong with the pump was by the Third Officer, is that correct?

A. That's right.

[fol. 380] Q. And what time about was that?

A. Quarter past 12.

Q. And he told you something which occurred a few minutes after he came on watch, is that right?

A. He told me that it was a leak in the pump.

Q. Did he tell you where the pump was leaking?

A. No, I came on deck and looked at it myself.

Q. This time you looked at the pump yourself?

A. Yes.

Q. The first time you didn't look at it, is that correct?

A. Yes.

Q. And this time did you go down into the shelter deck to see what was wrong?

A. No, I didn't. It wasn't necessary.

Q. All right, I am not arguing with you whether it was necessary or not, I want to find out what you did.

Did you see oil leaking from the pump from the main deck; while you were standing on the main deck did you see oil leaking from the pump?

A. Oil was spurting out of a hole in the discharge line.

Q. That was the time the oil was spurting out of the hole in the discharge line?

A. Yes.

Q. That was the first time that you were told that there was any leak in that pump?

A. Yes.

The Court: Now it is a hole in the hose, not the broken nipple, is that right?

Mr. Cunningham: Some other hole, sir.

Mr. O'Neill: I think we should straighten that out.

The Court: We better get it straight now. This is the first I have heard that the hose was leaking.

The Witness: Well, I mean to say that the discharge—or the line, the steam line to the discharge line had broken [fol. 381] off, the discharge line. The oil was spurting out of that hole.

By Mr. Cunningham:

Q. Tell me, how could you tell it was the steam line, could you see steam vapor coming out of it?

A. No, I didn't, but I saw another line hanging there.

Q. And that was the steam line?

A. Well, I suppose so.

Q. Now, are you sure it was the steam line?

A. There was no steam in it.

Q. Are you sure it was the steam line?

A. I am not an expert on pumps, but I have seen it many times, and they have always a line to blow the pump.

Q. For the third time I am going to ask you the same question.

Mr. O'Neill: I object and I suggest that the witness be allowed to finish. It is a very technical piece of equipment. The man has testified all afternoon that he knows nothing about pumps, and we got mixed up here with the discharge hose and the connection on the discharge hose. I think that the witness should be allowed to explain.

Mr. Cunningham: I don't want to be unfair with the witness.

The Court: No, I know why you are asking it.

By Mr. Cunningham:

Q. Tell me, Mr. Folkman, are you certain that it was the steam line where the leak was coming from?

A. It was my impression.

Q. Are you sure that the leak was coming from a line?

A. Sure I am. It was coming from the discharge line.

[fol. 382] Q. I see. And how far from the pump was the discharge line broken?

A. I cannot give any certain measurement about that. I didn't measure it.

Q. Well, you watched it from the main deck. Was it quite a distance away from the pump where the line was broken or was it right up close to the pump?

A. It was close up to the pump.

Q. And this is the large discharge line that goes over on the pier, is that correct?

A. Yes.

Q. And that time the Third Officer went ashore to get someone from the pump crew, is that correct?

A. Yes.

Q. You didn't go ashore this time yourself?

A. No, no.

Q. And how long was it between the time that the Third Officer went ashore and someone from El Dorado appeared, approximately? I don't ask you to remember exactly. Was it only a few moments?

A. There were several minutes which passed.

Q. Several minutes?

A. Yes.

Q. And then who came aboard the ship?

A. The oil crew.

Q. Do you remember who it was; was it Mr. Sexton?

A. Not Mr. Sexton came then, not first.

Q. Somebody else?

A. Somebody else.

Q. And they shut off the pump?

A. They shut off the pump, yes.

Q. Was it later on that Mr. Sexton came aboard?

A. Yes.

Q. How much after the leak occurred did Mr. Sexton come aboard?

A. I can't give any time recollection of that.

Q. I know it is very difficult. How long would you say before the accident to Mr. Skovgaard did Mr. Sexton come aboard?

[fol. 383] A. Well, around half an hour, let me say that. I can't give you any time recollections after three years.

Q. All right. I appreciate your difficulty in naming time. But are you sure that Mr. Sexton did not come aboard with the man who operated the pump?

A. I didn't say that. Mr. Sexton came on board after the leak.

Q. Yes. Well, you see, after the leak the Third Officer went ashore and he got someone from the El Dorado people, they came on the ship; did Mr. Sexton come on with that man?

A. Not altogether. He came later.

Q. And did you talk to that man who came on the ship first at all?

A. I cannot remember that I had any conversation with him.

Q. And you did have a conversation with Mr. Sexton, though?

A. Yes.

Q. And that conversation took place on the main deck?

A. On the main deck, yes.

Q. And referring to Respondent's Exhibit 2, the photograph, can you point out where on the main deck you had this conversation with Mr. Sexton, if you are able to do that?

A. Well, on this side.

Q. On the starboard side?

A. Yes.

Q. Which is the side closest to the pier?

A. Yes.

Q. And that conversation had to do with the fact that oil had gone down into the cargo hold forward of the tanks, is that correct?

A. Not only forward, also in the sides.

Q. You mean also damaged the cargo which was in the wings of the ship?

A. Well, you know, as I already said, that was lumber, and we never placed lumber right on deck. So the oil had [fol. 384] run under the lumber, too, and I could not see how much damage was done to the lumber before it was discharged.

Q. I am trying to find out, Mr. Folkman, the nature of your conversation with Mr. Sexton.

A. Yes.

Q. It had to do with damage to the cargo by the oil?

A. That's right.

Q. And did you also have any other conversation with him at that time?

A. Concerning what?

Q. Concerning anything. What was the rest of your conversation, if it included anything except damage to cargo?

A. Well, I had a conversation with him about the leak, and the spurting of oil, and the oil on the tank lids and on the lids.

Q. And when you say "on the deck" you mean on the shelter deck?

A. Yes, on the shelter deck.

Q. In the area around where the men were working, and I think you ran your finger down where the hatch beams are?

A. I mean oil was all over the place.

Q. Yes, it was all over the place.

A. Yes.

Q. And you spoke to Mr. Sexton, and what did you say to him concerning the oil, other than the discussion concerning the damage to cargo?

A. Well, I asked Mr. Sexton what he was going to do about it. I asked Mr. Sexton what he was going to do about it.

Q. What he was going to do about fixing up the cargo or paying for the damage to the cargo?

A. Well, that is another thing. I wanted Mr. Sexton to sign a statement that the El Dorado Company was liable to any damage to the cargo by the pumping of the oil and the over-spurting of the oil.

Q. When you said, "I asked him what he was going to do [fol. 385] about it," what did you mean?

A. I mean about the oil laying on the tank lids, and around the deck, because they are going to discharge the oil, also take the sweepings.

Q. You knew the men were working in that area; of course, you saw them in that area?

A. Well, the pump was standing there.

Q. Now, did you tell Mr. Sexton to sweep the tank covers?

A. Mr. Sexton told me that they were going to salvage the oil.

Q. Tell me, sir, did you tell Mr. Sexton——

A. No, I did not.

Q. Are you sure of that; are you sure you didn't tell him to sweep the tank covers?

A. I could not give Mr. Sexton an order. I had no authority——

Q. Mr. Folkman, you are arguing with me.

Please tell me, did you tell Mr. Sexton to sweep up the tank covers?

The Court: Yes or no.

A. I did not give Mr. Sexton such an order.

The Court: Did you make a suggestion to him?

The Witness: I did.

The Court: You suggested.

The Witness: I did suggest it, yes.

The Court: He wants us to know that he couldn't order Mr. Sexton to do anything, is that right?

The Witness: I couldn't order Mr. Sexton.

The Court: He is not a part of your crew.

The Witness: No.

The Court: He belonged to the pump crew.

The Witness: That's right.

[fol. 386] The Court: And he takes orders from the boss of the pump crew, is that right?

The Witness: That's right.

The Court: It is like the Army.

By Mr. Cunningham:

Q. Did you suggest to him, sir—and I want to get this clear—that he sweep the oil off the tank cover?

A. Mr. Sexton told me that he was going to salvage the cargo.

The Court: No, no. You make it more difficult for yourself.

The Witness: Yes.

The Court: Did you suggest it to him?

The Witness: To sweep? No, I did not suggest.

The Court: All right.

By Mr. Cunningham:

Q. I misinterpreted your testimony, sir. I thought you answered Judge Modarelli's question by stating that you did suggest it to him. I am sorry.

A. Let me have the question over again.

Mr. O'Neill: May we have a recess?

The Court: Yes. I think he is getting a little mixed up.

Don't worry about it if we use words that perhaps you do not understand, or because you are in a courtroom. Just remember what you are saying.

Mr. Cunningham: Yes, if you don't understand me——

The Witness: I understand English.

The Court: And if I ask you a question and it isn't so, you say no.

We will recess for five minutes.

[fol. 387] [Short recess.]

The Court: You know, gentlemen, if you don't move along we are going to be here Thursday, too, I can see that now. I never anticipated that we would take that long.

By Mr. Cunningham:

Q. Just for the sake of the record, Mr. Folkman, would you mark the hatch covers to which you referred in the cross examination of Mr. Baker, with the initials "H.C.", please, meaning hatch covers?

[Witness marks photograph.]

Q. Now, are they also on the starboard side?

A. Yes, port tank on port side, starboard on starboard.

Q. Mark them on both sides, if they are on both sides.

[Witness marks photograph.]

Q. Now, I believe that we were talking about your conversation with Mr. Sexton about the oil on the tank lids. And in that conversation did you say, sir, that you offered sawdust to Mr. Sexton?

A. Yes, I did.

Q. You mean you spoke to him and suggested that sawdust be used to put on the oil?

A. After the—you can't put it in the oil, but afterwards.

Q. No, you did suggest to Mr. Sexton—stop me if you don't understand me—you suggested to Mr. Sexton that he take the sawdust and put it on the oil——

A. Yes.

Q. —which was on the tank lids. And what was your purpose in mind when you did that?

A. In order to secure safety.

Q. And did you also offer him sand?

A. Either. I mean either sawdust or sand.

Q. You had both on the ship and you offered him either?

A. Yes.

[fol. 388] Q. And sand could be used for the same purpose, safety?

A. Yes.

Q. And when we say "safety" you mean that it would sort of help people so that they wouldn't slip on the oil; is that what you had in mind?

A. It might avoid any kind of things that could happen. Better to be safe, work safe than work unsafe. I mean, a leader of a tank crew should know that.

Q. No, what did Mr. Sexton say when you offered him this sand and/or sawdust?

A. He pointed again out to me that he was the man who was discharging the oil.

Q. He said to you that he was the man who was discharging the oil?

A. He was the man who discharged the oil.

Q. And did you again offer him the sand or sawdust, or did you stop?

A. I had already done that.

Q. And then did Mr. Sexton leave the vessel?

A. I did not see Mr. Sexton again after that conversation.

Q. You did not see him again until today?

A. Yes, I did. I went up to the office after the accident happened, his office.

Q. You went to Mr. Sexton's office after the accident?

A. Yes.

Q. And he was in his office?

A. That's right.

Q. You didn't see the accident happen, you were in a room somewhere, together with Mr. Mallett, the surveyor?

A. I did not see the accident happen, actually, no.

Q. Is it true that you were in a room with Mr. Mallett, the surveyor?

A. That is true.

Q. But very shortly after the accident happened you went ashore to Mr. Sexton's office to get a stretcher, is that correct?

A. Yes, after we had taken the boat hooks out of the life-[fol. 389] boats, I left immediately, because Mr. Mallett was down in the tank, and we had a crew around, the Third Officer was on watch——

Q. At that time, as a matter of fact, there was yourself, the Chief Officer, the Second, Third and Fourth Officers around, weren't there?

A. No, no, no.

Q. Who was there?

A. We did not carry any Fourth Officer. I was around, the Third Officer was around, two of our crew members were around.

Q. How about the Second Officer?

A. The Second Officer was not on duty, but he was on deck.

Q. He was there, too?

A. Yes, but he was not on duty.

Q. And there were also other members of the ship's crew around?

A. Yes, those two, not any more.

Q. There weren't any other members of the ship's crew around?

A. No, they were—some were ashore—this is over midnight—and some were asleep.

Q. May I refer to the log? I think in the log it says otherwise.

[Counsel gets document.]

Was the ship's watchman there?

A. Yes, the ship's watchman—but he was not a member of the crew.

Q. By whom is he employed?

A. He is employed—I don't know where he is employed, but he is hired by the ship.

Q. And the First, Second and Third Officers were there?

A. Yes. But, as I said, the Second Officer was not on watch then.

Q. But he was there at the time?

A. Yes, he was there.

Q. And there were no other members of the crew there? [fol. 390] A. The two men who were supposed to be on board to drive the winches.

Q. The men who were on watch?

A. Yes.

Q. And when you went ashore you found Mr. Sexton in his office, and what did you say to him?

A. I told him that the man had fallen into the tank, and asked him to come on board.

Q. And what did he say to you?

A. He told me that he couldn't go on board, he was not able to look at a man who had been in an accident.

Q. Are you absolutely certain that you had that conversation with Mr. Sexton?

A. Positively, sir.

Q. You are certain of that, above all, that you had this conversation with Mr. Sexton ashore?

A. As sure as I sit here.

Q. And you didn't see him on the ship, as you were leaving the ship?

A. Mr. Sexton—I did never see Mr. Sexton again after that conversation, until today.

Q. When did you make out your log, sir?

A. I wrote the log during that night, after the pump crew left, because they would not go back on board the ship and discharge.

Q. And did you submit the log the same day?

A. I cannot remember, but that is not customary that we do. It may have been a few days afterwards, when the Captain signs it.

Q. So that the writing up of the log may have taken place that same day, but it wasn't submitted to the Captain until a few days later?

A. I do not know. It might be delivered the day after-

wards, or it might be delivered some days afterwards, for his signing.

Q. Yes. Now, the day of the accident, which would be December 6, 1952, didn't people come on board to take [fol. 391] statements from you?

A. Yes.

Q. And didn't you talk over the accident with them before you made out the log book?

A. Well, that accident—how it happened was told to me by one of the pump crew, because I did not see it, immediately afterwards.

Q. Anything in the log concerning the happening of the accident was written in by you, but is what someone else told you?

A. I haven't read the log for three years. I am not with that company any more. But what I wrote there is the truth.

Q. Please. Is what you wrote there concerning the happening of the accident what somebody else told you happened?

A. Yes.

The Court: It was reported to you, what happened?

The Witness: It was reported to me by one of the tank crew.

The Court: So you didn't see it.

The Witness: Yes. Nobody else from the ship did see the accident, from the ship's crew, so I had to get a version of what happened.

The Court: A version of what happened.

The Witness: Yes. I mean I had to—tell me what happened.

Mr. Cunningham: All right. I have no further questions of this witness. Thank you, Mr. Folkman.

Redirect examination.

By Mr. O'Neill:

Q. Now, Mr. Folkman, you didn't get down and examine, right at the scene of the accident, the part of the pump that broke, did you?

A. No.

Q. What you saw was from up on deck, is that correct?
[fol. 392] A. That's correct.

Q. And this line that you talk about, that steam line, what is the purpose of that steam line, do you know?

A. It is to blow the pump.

Q. In other words, we have instead of one line running out of the discharge end of the pump, we have some sort of a connection there with a small line coming into that and a big line going over the side, is that it?

A. Yes.

Q. And this trouble you had there was somewhere in the vicinity of this small line that came—joined the discharge line some place, is that correct?

A. Yes.

Q. Now, this crew, this tank crew who were aboard the ship, it was expected, when they got finished pumping this tank, that they would climb down these ladders that were in the tank, is that correct?

A. Yes.

Q. And in doing that they would be subjected to this oil going down, is that correct?

A. Yes.

Q. And they had to go down in the bottom of that tank and scrape the walls of the tank with these squeegees, I think they call them?

A. That's right.

Mr. O'Neill: That is all.

Recross examination.

By Mr. Baker:

Q. Now, this steam line that you are referring to, does that belong to the ship?

A. No, the ship does not deliver any kind of power, steam or electric, to pump crews—the oil company's equipment.

Q. And this oil pump was an electric pump, wasn't it, not a steam pump?

A. That was an electric pump, yes.

Q. Now, the hatch beams in this particular hatch, when

[fol. 393] they put the dry cargo on, do you know whether or not there is one or two hatch beams for each tank?

A. There is one, going this way.

Q. One going aft and forward?

A. Yes.

Q. On each tank?

A. On each tank, yes.

Q. And while this unloading is going on, who was in charge of the ship?

A. The loading of the oil?

Q. Who is in charge of the ship while the unloading is going on?

A. I don't understand your question.

Q. Who is in charge of the entire vessel while the unloading is going on at Bayonne, New Jersey; are you in charge?

A. Well, I am in charge of the ship. I mean the moorings, and all these things, yes.

Q. So you were in charge of the ship?

A. Yes.

Mr. O'Neill: Now, I object to that, sir, as characterizing his testimony. He said he is in charge of the moorings and that part of the ship.

By Mr. Baker:

Q. Well, who is in charge of the entire ship; weren't you?

A. I don't understand your question—of the entire ship.

Q. Well, there is only one ship, isn't there?

A. Will you make it a little more specific?

Q. Well, who is in charge of the ship? Isn't that specific enough?

A. I am not in charge of the engine. That belongs to the ship, too.

Q. Well, you are in charge of what part of the ship then, the deck part?

A. Pump? Not the pump.

Q. I am not talking about the pump. Are you in charge of the vessel insofar as the deck department is concerned?

[fol. 394] A. The vessel and the crew, yes.

Q. And you are in charge of the deck department. Aren't there two departments aboard a vessel, an engine department and deck department?

A. No, there are more departments. But, anyhow—yes, I am in charge of the deck department, as long as I am signed on the ship as Chief Officer.

Q. Now, after this accident to Mr. Skovgaard was there any sawdust put on these particular locations, around the hatches, and so forth?

A. After the accident with Mr. Skovgaard I was—gave statements to the police, and quite a few men from the insurance company, and detectives who came on board, so I did not further, after that—after we had landed the body, and he was laying on the pier, waiting for the hearse, I was down on the pier for an hour, and I had been working all day, and night before, and so after that I did not go any more on deck, but I laid down, until the pumping commenced at 6 o'clock in the morning, around that.

The Court: Now, hold it. What was the question?

[Question read.]

The Court: Now, all that you said was interesting, but it didn't answer the question.

A. I don't know.

The Court: That is all you had to say instead of all the other speech that you made.

By Mr. Baker:

Q. Before the new pump crew came on, the next day, was there sawdust put about this oil, where the oil had been on these tank lids, and so on.

A. Sawdust was on the tank all the next day, yes.

Q. Who put that on?

A. I don't know.

[fol. 395] Q. Were you there the next day and you saw the sawdust there?

A. I saw it, yes.

Q. What else did you see around that open port tank, what else?

Mr. O'Neill: When?

Q. The next day, when you came there, before the new pump crew started to do their work?

Mr. O'Neill: Well, he said that he went to bed and he didn't get up until they started pumping at 6 o'clock. So I think we should have a time placed on there.

The Court: Did you come on board the next day—or the same day, December 6?

The Witness: I was on board all the night.

The Court: Then you went to bed, you said?

The Witness: Yes.

The Court: When did you come on board again?

The Witness: I was on board all the time. I had my accommodation on board.

By Mr. Baker:

Q. When did you come to this particular hatch where the unloading of this oil was taking place?

A. I cannot give you any time. I don't remember.

Q. When was it that you saw the sawdust there the next day?

A. Some time the next day.

Q. You don't know what time?

A. I can't recollect.

Q. What else was around this open hatch when you saw the sawdust, what else was there at that time?

A. The cargo, the damaged cargo.

Mr. O'Neill: This is all objectionable. I don't see how [fol. 396] it is material. We have had strange people on the ship after this, a new crew came aboard.

Mr. Baker: I will ask this specific question then.

Q. Did you see any ropes about this open hatch the next day, this port tank?

Mr. O'Neill: I object to that, too, because that is subject to probably the objection—the oldest rule of evidence. You can't put in anything like that—after the accident, what was done?

The Court: It might tend to show whose responsibility it was to provide safeguards. That's the only way it could be admitted. Certainly nothing that happened afterwards would be binding, but it might tend to show who assumed that responsibility the next day—that is, if he did see ropes. I haven't heard the answer.

Were there any ropes around the open hatch the next day?

The Witness: I cannot remember.

The Court: You don't remember. That settles that.

By Mr. Baker:

Q. You don't remember at all whether there were any ropes?

A. When I first looked down in the hatch the pump had been removed, down to the lower 'tween deck.

Q. I am asking you whether or not around this open hatch—

A. I don't remember.

Q. —around the open lid, of the port hatch, where it was half open, or thereabouts, there were any ropes around that.

A. I can't remember that.

Q. Would you say there wasn't?

A. I can't remember.

The Court: If he can't remember, he is not going to guess [fol. 397] to please you or any lawyer in the case. If he can't remember, he can't remember. And I can imagine what a lot of good ropes would do, if a man slips. He would probably take the rope down with him.

Mr. Baker: That is all.

Redirect examination.

By Mr. O'Neill:

Q. Well, you didn't order any ropes placed there, did you?

A. No.

Mr. Cunningham: One question, sir.

Recross examination.

By Mr. Cunningham:

Q. Did you discuss this breaking of the steam line with Mr. Mallett, the surveyor?

A. No.

Q. He was in the room with you at the time of the accident to Mr. Skovgaard, wasn't he?

A. Yes.

Q. How long were you in the room with Mr. Mallett after the break in the steam line?

A. We were sitting up there reading, maybe 20 minutes. I can't remember any time exactly. Twenty minutes.

Q. What I am trying to find out is, after the break in the steam line did you go into the room and was Mr. Mallett there?

A. Mr. Mallett never was in my room. He was up in the smoking salon.

Q. Or wherever it was. It was some room in the ship?

A. Yes.

Q. And Mr. Mallett was there, but you didn't talk about the break in the pump, or the steam line to the pump at all, did you?

A. Not that I can recollect that we discussed that matter.

Q. He didn't mention anything to you about it?

A. He might have mentioned it, but I can't recollect.

[fol. 398] Q. You can't recall it now?

A. I can't recall what we discussed for three years.

Q. I beg your pardon?

A. I can't recall what we discussed three years ago.

Q. Do you have any recollection of your conversation with Mr. Sexton?

A. Yes, I have.

Mr. Cunningham: That's all.

[Witness excused.]

The Court: Will you need this gentleman any more in the case?

Mr. O'Neill: Well, sir, there has been, I think, a little too much talk about the First Officer and Mr. Sexton to let him get on the plane tomorrow some time. He is over here and he is going to fly away as soon as he is finished. But there has been so much talk about him and Mr. Sexton I think we better keep him till Wednesday. I think it is only fair that we have everybody here, sir.

The Court: All right. How many more are you going to call?

Mr. O'Neill: I have two.

The Court: Two more. And then Mr. Cunningham?

Mr. Cunningham: I am going to have to put on Mr. Sexton, obviously, and I am going to put on Mr. Sampson and Mr. O'Leary.

[Discussion off the record.]

Mr. Cunningham: Does your Honor wish summation at the end of the case?

The Court: No, I don't want to hear any speeches from lawyers. That's all right with juries. All I want are pro-
[fol. 399] posed findings of fact and conclusions of law.

Mr. Cunningham: Does your Honor wish a brief?

The Court: If, in your judgment, I should have a brief. Don't duplicate anything that you have in your trial brief. You advert to it in your brief. Don't do any more duplicating than you have to, because it is hard on me and it is hard on you. If you have covered the point in your trial memorandum, advert to it, that that point is discussed on page soandso of the trial memorandum. Only give me new matters that you should call to my attention, that may have come out in the testimony that developed. But a speech I don't want.

Mr. Cunningham: I mean on the law, whether you want the legal questions presented orally.

The Court: Of course, that can be transcribed. But I don't want to listen to summations.

Mr. Cunningham: Not on the facts, no.

The Court: If you feel at the end of the case there is anything you would like to present orally, if you don't take too long, I will listen to it.

Mr. Cunningham: Some legal questions can be ferreted out orally a whole lot easier.

The Court: It is all right with me if you think you can do it better that way, I will do it. If you think it is better to reduce it to writing, so I can read it carefully, I will give it a lot of consideration.

Mr. Baker: Your Honor, on this question of the life expectancy, the new rules which I read to the Court at the time I introduced them, I have checked the books on it and I find out that this is the first time that the life expectancy has been made a part of the rules.

[fol. 400] The Court: That is true. They used to have suggested life expectancy tables in the old Chancery Rules.

Mr. Baker: May I say this to your Honor, if we can handle it in this manner, to ask the Court to consider these tables—and that is what they are, just a matter of consideration—and if counsel for the respondent feels that he has any other tables, he can present those.

The Court: That's right. Or if you can agree on the table to be used. There are several standard tables that have been used before.

Mr. Baker: They are all about the same.

The Court: I know they are. There are slight variances. Well, tomorrow, as you know, is a legal holiday.

[Discussion off the record.]

The Court: Wednesday morning, 10 o'clock.

Mr. O'Neill: Thank you.

The Court: Mr. O'Neill, and gentlemen, that objection which you made to Russo's statement going in is valid in New Jersey, unless you are ready to bring in the man who took the statement and testify to the contents thereof, and that Mr. Russo either had it read to him or read it himself before he signed it. If you are not ready to do that I will have to sustain Mr. Baker's objection. That is the law in New Jersey. If you are going to bring in the man who took the statement, that will be different. Do you expect to?

Mr. O'Neill: I do.

The Court: You will bring him in, all right.

[fol. 401] Mr. O'Neill: I thought the recognition of the signature might be enough.

The Court: No, sir; not in New Jersey. I thought so, too, but Mr. Baker persuaded me otherwise. And the law is still the same, it hasn't been changed. You must face him with the man who took the statement. And he must swear that that is what he put in there, and that is what the other man read, or he read to him, before it goes in.

Court is adjourned.

[Whereupon, the hearing was adjourned to be resumed Wednesday, November 9, 1955, at 10:00 a.m.]

Newark, N.J.

Trial resumed pursuant to adjournment.—November 9, 1955

[Appearances as previously noted.]

Mr. O'Neill: Mr. Clabault, will you take the stand, please?

HERBERT CLABAULT, called and sworn by the respondent, testified as follows:

The Clerk: May we have your full name, please, sir?

The Witness: Herbert Clabault, C-L-A-B-A-U-L-T.

The Clerk: And your address, for the record?

The Witness: 235 Maple Street, Harworth, New Jersey.

[fol. 402] Direct examination.

By Mr. O'Neill:

Q. Mr. Clabault, with whom are you associated?

A. Shipowners' Claims Bureau.

Q. And what is the business of Shipowners' Claims Bureau?

A. Shipowners' Claims Bureau are a P. and I. insurance company, a marine protective and indemnity insurance company. And as such we represent the Assurensforenin-

gen Skuld of Oslo as their principal representatives in the United States.

Q. And were you so employed on December 5, 1952?

A. I was.

Q. Now, on that date, or the following day, did you receive any orders with respect to the ship Tungus?

A. On the morning of the sixth I received a telephone call at home, proceeded to the Tungus to conduct an investigation, as it was reported that somebody had been killed aboard the vessel.

Q. As a result of going aboard that vessel did you make arrangements to interview any of the people who worked for El Dorado?

A. I did.

Q. And will you tell us how you made arrangements to interview these people?

A. I made arrangements—first, while I was down at El Dorado on Saturday I spoke to Mr. Taylor, and on the Monday morning, on his recommendation, I called Mr. Blaney, and made arrangements with him to interview the three men who were aboard the ship at the time when the accident occurred.

Q. Now, did you interview any of the gentlemen who have appeared here as witnesses?

A. I did.

Q. Did you interview the first gentleman, Mr. Donohue?

A. Yes.

Q. Now, will you tell us just where you interviewed him [fol. 403] and what statement he gave you when he was interviewed?

A. I interviewed him at the office of the El Dorado Oil Company, Bayonne, New Jersey, and he gave me a statement——

Mr. Cunningham: I am going to object. No foundation has been laid for this testimony.

Mr. O'Neill: Well, Mr. Donohue has been testifying here since the case started that he doesn't recall whether he gave statements or not.

Mr. Cunningham: What he said in the statement is something else.

Mr. O'Neill: I am just going to ask the gentleman what——

Mr. Cunningham: He is now testifying, I believe, as to what was said and there has been no foundation laid for that, because Mr. Donohue was not asked whether or not he said something contrary to the testimony on the stand which Mr. Clabault apparently took in his statement.

Mr. Baker: I join in that objection.

Mr. Cunningham: If such is the intention, I submit the foundation should have been laid at the time Mr. Donohue was on the stand.

Mr. O'Neill: Your Honor, may I recall Mr. Donohue for cross examination?

The Court: You certainly may.

Mr. O'Neill: Will you step down, Mr. Clabault.

[Witness temporarily excused.]

The Court: You know, it gets very tiresome on this bench hearing people who made statements saying they don't remember they made them, and then saying they never [fol. 404] said what is in the statement, as if they are a bunch of illiterate foreigners who can't read, nor write, nor understand English. I can understand lapses of memory, that's understandable, after a period of years.

Mr. Donohue, resume the stand, please.

Mr. Baker: Your Honor may find out that there may be some aspersions cast upon the persons who took these alleged statements.

The Court: Nobody knows about investigators more than I do, sir.

Mr. Baker: When I get through with that cross examination of these men who claim they took the statements your Honor will be very much impressed with what they put in those statements.

The Court: Upon such a showing I know what to do, Mr. Baker.

Mr. Baker: I know you do.

EDWARD DONOHUE, resumed the stand.

Cross examination.

By Mr. O'Neill:

Q. Mr. Donohue, do you recall being interviewed by Mr. Clabault at the El Dorado plant on December 8, 1952?

A. Yes, sir.

Q. And at that time did you tell Mr. Clabault that Mr. Skovgaard fell from the tank lid into the tank?

A. Yes, sir.

Mr. O'Neill: That is all. I have nothing further.

Mr. Baker: May we have that question and answer read?

[Record read.]

Mr. O'Neill: I have nothing further.

[fol. 405] Mr. Baker: No questions.

Mr. Cunningham: I think I have to ask Mr. Donohue a question.

May I see the statement taken by Mr. Clabault?

Mr. O'Neill: No, sir.

Mr. Cunningham: Will the Court order Mr. O'Neill to present the statement to me which was taken by Mr. Clabault? The Court has already ordered me and I have given Mr. O'Neill the statement which we took.

The Court: Yes. I am surprised that Mr. O'Neill says no.

Mr. O'Neill: I will give it to him. I just want it for the record, since everybody objected.

Mr. Cunningham: I didn't object to giving them.

The Court: No, I thought Mr. Cunningham has been most cooperative in handing over statements whenever you asked for them.

Mr. Cunningham: Thank you, sir.

The Court: Do you want me to order you to give it to him?

Mr. Cunningham: He gave it to me, sir.

Now, would you mark this statement for identification, please.

The Clerk: RI-2 for identification.

[Marked Exhibit RI-2 for identification.]

Mr. Cunningham: May I have a moment to read this, sir?

The Court: Yes, sir.

[Counsel examines document.]

[fol. 406] Mr. O'Neill: I think that is the original of the copy of the statement you have.

Mr. Cunningham: This was given to me as a result of a motion for discovery and inspection made by the libellant. I just wanted to make sure it was the same statement.

Cross examination.

By Mr. Cunningham:

Q. Mr. Donohue, I am going to ask you to read this statement, which is Respondent-Impleaded Exhibit 2 for identification, and ask you whether or not that refreshes your memory as to what you told Mr. Clabault concerning the place from which Mr. Skovgaard fell.

Mr. O'Neill: If your Honor pleases, I am going to object, sir. The witness has testified what he told Mr. Clabault that morning, and now they are asking him to refresh his recollection to change his story.

Mr. Cunningham: The statement doesn't say that, sir, and that is why I thought perhaps Mr. Donohue better read what he said before he testifies. In his statement he doesn't say that he fell from the tank lid.

Mr. O'Neill: All right. Objection withdrawn.

The Court: I have often thought that it would be a very good thing and good practice that if when people were asked to give statements about accidents they were given a copy of the statement. It is a difficult thing to expect a disinterested witness who happens to see an accident get on the stand two or three years later and remember what he had in a statement, when the average man can't tell you what he had for dinner a week ago on a certain night.

[fol. 407] By Mr. Cunningham:

Q. Mr. Donohue, have you read that statement, RI-2 for identification?

A. I have.

Q. Now, does that refresh your memory as to what you actually told Mr. Clabault concerning the place from which Mr. Skovgaard fell; if so, tell us what you told Mr. Clabault, if that refreshes your memory?

Mr. O'Neill: That is several questions in one.

Mr. Cunningham: All right. I thought we would save time.

Q. Does that refresh your memory as to what you told Mr. Clabault?

A. Pretty near as to what I signed here.

Q. Would you tell his Honor what you told Mr. Clabault concerning the place from which Mr. Skovgaard fell aboard the Tungus on December 6, 1952?

A. Well, it is more or less what I said before, how he got up on the tank top, and walked around the coaming on the deck, and he walked from the corner of the tank—from the corner of the tank walked around up on to the corner of the beam, stepped up on the beams up on to the tank cover.

Q. Did he fall while he was tanding (sic) on the tank cover or did he fall as he was stepping from the beam to the tank cover?

A. As he was about to step up on to the tank cover.

Mr. Cunningham: All right. No further questions.

Cross examination [Continued].

By Mr. O'Neill:

Q. Now, you were the first one interviewed about this accident, weren't you, Mr. Donohue?

A. I don't remember whether I was or not.

Q. Well, do you remember after you gave a story to Mr. Clabault you then discussed the matter with Mr. Russo?

A. I don't recall it.

[fol. 408] Q. But do you recall now that the first story you gave him was he fell from on top of the tank top near the pump?

A. Well, that is what it says here in the statement I made.

Mr. O'Neill: That is all I have of the witness. I will put Mr. Clabault back on.

Mr. Baker: Just a minute.

Now, in this statement, would you read this part of it, as to the location——

Mr. O'Neill: Let me ask one further question.

By Mr. O'Neill:

Q. You were in Mr. Cunningham's office before you testified here in court, weren't you?

A. That's right.

Q. Did Mr. Cunningham show you that statement?

A. No, sir.

Mr. Baker: Did I ever see this statement?

Mr. Watson: Yes.

Mr. Baker: There are so many of them around.

Will counsel produce the statement of Mr. Donohue dated December 8, 1952?

Mr. Watson: That is it.

Mr. Baker: No, there is another one.

Mr. Cunningham: I think I am going to offer that statement in evidence, your Honor.

Mr. Baker: I have another statement, December 8, 1952.

Mr. Cunningham: Any objection to the offer of that statement?

Mr. Baker: I object to it. I call upon either counsel to produce the original of this statement, December 8, 1952. [fol. 409] The Court: Now, wait a minute, sir. You might be misled. This statement is dated December 8, 1952. You looked at the top where it says: "Death, December 6, 1952." This is December 8, right under Mr. Donohue's name. Then it says, "Statement taken at El Dorado Oil Company at Bayonne, New Jersey, on December 6, 1952."

Am I right, Mr. Donohue, does it say December 8, 1952?

The Witness: That's right.

The Court: Then it says, "Taken December 6." So you will have to reconcile those two dates.

Mr. Baker: I have another statement here—copy only—of a statement dated December 8, 1952.

The Court: Let's see where that date is.

Mr. Baker: This is only a copy. I don't know where I got it. I think I got it from the oil company.

Mr. Cunningham: Here is one dated December 8, 1952, signed by Mr. Donohue, witnessed by a Mr. Yarbody. That is a photostatic copy of an original statement dated December 8, 1952, signed by Mr. Donohue.

Mr. Baker: And taken by whom?

Mr. Cunningham: I don't know.

Mr. O'Neill: I may say at this point, not by me or anybody in my behalf.

Redirect examination.

By Mr. Baker:

Q. Now, would you take a look at this statement which has just been given to me by——.

Mr. O'Neill: I am going to object to this. I don't know what the statement is, and I don't know what its purpose is, and I don't think there has been any denial that he made a [fol. 410] statement. Now, Mr. Baker is the one who produced the paper to your Honor here.

The Court: I always thought that the purpose of a statement was to show that the man on the stand, under oath, said something which was otherwise than he said in a statement taken before. You just don't bring statements around to kill time.

Now, if there is anything in that statement that is contradictory to what Mr. Donohue testified to already, you may present it.

Mr. Baker: It contradicts this statement, your Honor.

The Court: No, anything he said on the stand concerning this accident.

Mr. Baker: Yes, it contradicts this statement which they are producing now.

The Court: You mean there is another version in there?

Mr. Baker: Yes.

By Mr. Baker:

Q. Is this your signature?

A. Yes, sir.

Q. And that is dated when, December 8, 1952?

A. That's right.

Q. And in that one did you say, "Carl slipped——"

Mr. O'Neill: This isn't in evidence.

The Court: Not yet.

Mr. Baker: It will be.

Q. "Carl slipped"—what is that word?

The Court: Hold everything. Is the other one in evidence?

[fol. 411] Mr. Cunningham: No.

Mr. Watson: Mr. Baker objected to it.

Mr. O'Neill: Mr. Baker objected to the other statement, so I don't see how he can make the comparisons. There has been no ruling on that.

The Court: So the other one is not in evidence.

Mr. Baker: Wait now.

Mr. Cunningham: I made the offer, your Honor, in view of the fact that we have been talking about the statement so much, I thought your Honor should read it.

As a matter of fact, I will offer the other statement in evidence so that your Honor can read them both and decide whether or not they are contradictory.

The Court: That makes a lot of reading for me, Mr. Cunningham. Counsel is supposed to point out to me where the discrepancy is and the contradictions.

Mr. Cunningham: Yes, sir; but where there is such a discussion about statements I think it best that at least someone offer them in evidence. And I make that offer.

Mr. O'Neill: I don't quite get this. I offered a statement which directly contradicts a statement made by the witness on the stand. Now they come ahead, and they have a statement—I don't know who the gentleman is who took it, and I don't know what his interest was in the case, and it has been shown to this witness, and he has been asked whether or not he made that statement. I don't see, sir, how any foundation has been laid for it, because my statement was put in solely to contradict something he said. And I don't think you can put in—I know of no rule which permits an attorney to put in a statement taken of a witness who is [fol. 412] in court.

The Court: Not unless he wishes to impeach him or otherwise show that he didn't tell the truth on the stand. No

doubt about that. If he testifies to something which is not in this statement taken by Mr. Yarbody, and Mr. Yarbody is not here to face him and say he said so, of course it can't go in evidence. And if this man says he doesn't know who Mr. Yarbody is, then you can't even—is it signed? If he admits his signature, then you can examine him.

I am primarily interested in contradictions, that's all, to affect his credibility.

Mr. Baker: Is there a ruling by your Honor on this statement which was offered? That's the one that Mr. O'Neill offered.

Mr. Cunningham: No, I offered them both.

The Court: Do you offer them both?

Mr. Cunningham: I offer them both.

Mr. O'Neill: I have no objection to the statement we took, sir, but I know nothing about the other statement. I have never seen it.

The Court: You can't have the other one until the proper foundation is laid. Any objection to the original one?

Mr. Baker: I am objecting to the statements.

Mr. O'Neill: I am also going to object to this witness having an opportunity here to read a statement that isn't in evidence. And he has been reading it there for the last three or four minutes. That isn't proper, either. Laying a foundation for a statement, as Mr. Baker pointed out, is very technical. And here he is giving the witness something [fol. 413] to read on the stand that isn't in evidence.

The Court: Well, it doesn't have to go into evidence. Many times statements don't go into evidence. They're only examined from the statement and shown that they mad (sic) contradictory statements under oath. They don't always put the statements in, because generally it only clutters up the record with a lot of repetition of what he actually did say, and agrees with what he said.

Do you object to this one dated December 6 and December 8?

Mr. O'Neill: No, sir.

The Court: Do you object, Mr. Baker?

Mr. Baker: I object.

The Court: Upon what ground?

Mr. Baker: On the ground that the statement doesn't contradict any of the testimony he has given, that substan-

tially it tells the same story he is telling now, substantially. But the statement itself indicates that it is a very brief version, and that it does not give a complete and accurate and true version of the happening of the accident.

The Court: The statement does not give a true version?

Mr. Baker: Not full and complete.

The Court: How do you know that, sir? Were you there when this accident took place, or was Mr. Donohue there? You are making a rash statement, that this statement is untrue.

Mr. Baker: No, I didn't say that.

The Court: You said it is not a correct version.

[fol. 414] Mr. Baker: I say it is not a full and complete version.

The Court: Is what is in here accurate, in your opinion? Do you know those things? Don't say so unless you know.

Mr. Baker: I can't say.

The Court: All right. This will be marked in evidence.

The Clerk: RI-2, formerly marked for identification, now marked in evidence.

[Received and marked Exhibit RI-2.]

By Mr. Baker:

Q. Mr. Donohue, did you make more than one statement?

A. Well, this statement here, this first one, this is the first I have seen it. And this other one is another one; the first time I have seen that one. I may have made more.

Q. What?

A. I could have made a number of statements.

Q. And when this statement was made—when this man from the Shipowners' Claims Bureau came down did he ask you any questions?

A. I believe he did.

Q. And who wrote it down?

A. He wrote them down.

Q. Did he write it down in the language in which you gave it to him?

A. I don't know whether he did or not.

Q. Did you read the statement before you signed it?

A. I read it over, yes. I didn't read it completely, or go

into each detail of what I said. It is the truth of what actually happened and——

Q. And did he put it down in the same language as you had given it to him, or did he use his own language?

The Court: If you know.

[fol. 415] A. I don't know.

Q. Now, two days later, on December 8, 1952—not two days later——

The Court: Don't get mixed up now. This one is confusing. I told you it has two dates on it, December 6 and December 8. We will have to have Mr. Clabault explain when he did take it.

By Mr. Baker:

Q. Well, anyway, on December 8, 1952—I show you another written statement—signed by you, is it?

A. That is signed by me.

Q. And somebody questioned you at that time concerning the happening of the accident?

A. I believe so. I have a statement here.

Q. And at that time did you make this statement, "Carl stepped on to this 'I' beam with his right foot—"

The Court: Just a minute.

Mr. O'Neill: I am going to ask before he reads whether or not he is reading this to contradict the witness' testimony or is he reading it solely to get more testimony from the witness. I don't know just the purpose of it.

Now, if it is claimed that this statement is different, and there is a different statement in here, and contradicts something the witness said, I have no objection.

Mr. Baker: My purpose here is to show a variance between two statements.

The Court: All right. You may do that.

By Mr. Baker:

Q. Did you say here, "Carl stepped on to this 'I' beam [fol. 416] with his right foot and made an attempt to move his left foot on to the plate about one—" What is that?

A. One foot.

Q. "—one foot, stepped up and seemed to slip." Did you say that at that time?

A. I signed the statement. I must have.

The Court: As a matter of fact, isn't that what Mr. Donohue said on his direct examination?

Mr. Baker: That's right. And I am bringing this statement in to reaffirm——

The Court: What for, to reemphasize it?

Mr. Baker: In view of the statement which——

The Court: I don't care about that. I have to judge which one is true.

Mr. Baker: If your Honor please, there are cases on it, I know, that where a statement is offered in evidence, another statement is admissible in order to contradict the statement and reaffirm what he said before.

The Court: That is provided the man who took that statement is going to be here. I have no assurance yet that he is going to be here.

Mr. Baker: Well, let's see if they object to it. I am offering this statement in evidence.

Mr. O'Neill: Naturally, sir, I don't think it is admissible under New Jersey law, or on the argument that Mr. Baker makes.

The Court: That's right, which he pulled on you, in plain English, and you were sustained because you were right. Now, if you are going to produce Mr. Yarbody, if you can show that there is any disagreement.

[fol. 417] Mr. Baker: The purpose of mine is entirely different than the purpose in which I objected to their statement. I objected to their statement to contradict them. This is to reaffirm.

The Court: Can you show me a case that says a witness' testimony has to be reaffirmed, or reenforced, that he said it several other times, too? If you could show me five times where he said one thing and Mr. George could produce one statement here which shows that at another time he said something else, it would be for me to determine or make a finding which I think is true.

Mr. Baker: But the cases hold, your Honor, and I can produce the case.

The Court: All right. I will give you an opportunity to produce the case. In the meantime, mark it for identification.

Mr. Baker: All right.

The Court: Don't state the principle, just show me the case. The ruling will be very easy then.

Mr. Baker: Mark it for identification.

The Clerk: Photostat of statement will be marked L-10 for identification.

[Marked Exhibit L-10 for identification.]

Mr. Cunningham: I have no further questions of this witness.

Mr. O'Neill: I have.

The Court: Make a note, sir, that he is going to produce the law for this, otherwise he will forget.

Mr. Baker: That is all.

The Court: Is that all of Mr. Donohue?

[fol. 418] Mr. O'Neill: No, I have one question.

Recross examination.

By Mr. O'Neill:

Q. After this accident you went home, did you not, Mr. Donohue?

A. That's right.

Q. And you didn't give any statement on December 6 because you left about 2 o'clock in the morning?

A. That's right, sir.

Q. And the next time you were at the plant was when?

A. The following day.

Q. Sunday?

A. No, it must have been Monday then.

Q. That would be December 8?

A. Monday, that is right.

Q. And that is when you saw Mr. Clabault?

A. That's right.

Mr. O'Neill: I think that straightens it out.

The Court: Yes, I think it does. I thought it was an error.

By Mr. O'Neill:

Q. I am going to ask you once again, did you discuss with Mr. Russo, or anybody else, the statement you were to give as to the happening of this accident before you signed RI-2 in evidence, this statement?

A. You mean did I actually talk to Mr. Russo and he told me what to say?

The Court: No, just discussed it with him, talked about it.

The Witness: Sure we talked about it.

The Court: Naturally, you would.

Q. This was after you talked to Mr. Clabault?

A. After or before, I don't remember.

Mr. O'Neill: That's all.

[fol. 419] The Court: That's not unusual, Mr. Witness, that you discussed it with somebody else who saw it.

Mr. Cunningham: I have no further questions.

Mr. O'Neill: I have nothing further.

The Court: Step down, Mr. Donohue.

[Witness excused.]

The Court: Now we will call Mr. Clabault back, please.

HERBERT CLABAULT, resumed the stand.

Direct examination [Continued].

By Mr. O'Neill:

Q. Mr. Clabault, in the ordinary course of your business, after you have investigated an accident, do you prepare anything for the company records?

A. Yes, I prepare a memorandum.

Q. And did you do that in this case?

A. Yes, I did.

Q. I show you this memorandum and ask you whether or not that is the memorandum you prepared in this case?

A. Yes.

Q. And did you at that time, in that memorandum, make

any reference to the conversation and to the taking of the statement of Mr. Donohue?

A. Yes.

Q. And what was that?

Mr. Baker: I object to any reports he is making to his insurance company. What has that got to do with it, with the determination of this case at this time?

Mr. O'Neill: In the regular course of business.

Mr. Cunningham: If it is being offered in evidence—I don't hear that it has been offered in evidence—on the basis of the regular course of business rule, I object to it. I don't think the regular course of business rule was ever meant to allow someone to put in a statement when the person who made the statement is right here and able to testify himself. [fol. 420] If he did see or hear anything he should testify himself, not offer a statement in evidence which he made at the time.

However, I didn't hear an offer. Has it been offered?

The Court: No, it has not. He started to ask a question about it. That's all I heard.

What did he ask, Mr. Bremer?

[Question read.]

Mr. Baker: I object.

The Court: He isn't offering it in evidence.

Mr. Baker: But he is asking what was the reference. Now he is asking him to read from his record and his report to his insurance company what he said about the conversation with Donohue. I don't think that is admissible.

Mr. Cunningham: Before he is allowed to read from that statement, your Honor, it must be shown that his memory needs refreshing. He must be asked first whether or not he recalls it without the statement, and if he cannot recall it without the statement, then he may read the statement to see whether or not it refreshes his memory.

Mr. O'Neill: I will accept the suggestion of Mr. Cunningham.

The Court: Mr. Cunningham is right, technically, you know that.

Mr. O'Neill: I was coming to that anyway, sir. I wouldn't expect anybody, as your Honor said, to remember what happened three years ago.

The Court: Oh, no.

By Mr. O'Neill:

Q. Now, do you remember exactly what happened at that [fol. 421] time, the conversation with Mr. Donohue?

A. Well, not exactly word for word, but I recall the general substance of it.

Q. And what was the general substance?

A. When I first questioned——

Mr. Baker: I object to his report.

The Court: He is telling you now from his memory. He remembers the general substance, he says.

A. [continuing] When I take these statements—if I may explain—it is my habit to talk to the man first. Then when I get the complete story then I write up the statement, ask him to read it, and then sign it. I talked to Mr. Donohue first. And he first told me that Skovgaard came down, walked across the tank top, tried to start the pump, couldn't start it, stepped in front of the pump, slipped and fell.

While preparing the statement he said, "Wait a minute. I want to speak to Russo. I am not quite sure of the details. He was closer."

He went over and spoke to Russo and came back and said, "No, now that Russo reminds me, that is not right. This is what happened." And his signed statement is the second version that he gave me.

Q. Then you interviewed Mr. Russo next?

A. Yes.

Q. In talking to Mr. Russo—Mr. Russo has said he wouldn't have made a statement, as I recall his testimony, like we showed him here in court. Would you tell us what the procedure was when you interviewed Mr. Russo?

A. The procedure with Mr. Russo was the same as with Mr. Donohue. I talked to him, got, as I said, the complete story, wrote the statement up, in accordance with what he told me, asked him to read it, told him if there was anything in there that wasn't correct or that he didn't agree with, to [fol. 422] cross it out, if there was anything he wanted changed, to change it, and if it was correct, to sign it.

Q. And I show you this paper and ask you whether or not that is the statement of Mr. Russo?

[Document handed to the witness.]

A. Yes, sir.

Mr. O'Neill: I will offer that statement in evidence. This is the one you just read, Mr. Baker.

The Court: Is there any contradiction in that of what he said?

Mr. O'Neill: He said yesterday, when it was read to him, that he wouldn't have made a statement like that. In other words, he read this last paragraph—as your Honor recalls, we had this in for identification—he read the last paragraph, and after reading it, he said he would not have made a statement like that.

The Court: Would not have made a statement like that.

Mr. O'Neill: That is right. That is why I am offering this statement.

The Court: Do you object?

Mr. Baker: I think there is in the body of it, somewhere in the body, where he indicates that Russo said he didn't say, as it is set forth in the statement, and under those circumstances I think they have a right to offer it.

Mr. Cunningham: I have no objection to it. I still don't see any portion of the statement that contradicts Mr. Russo's testimony.

Mr. O'Neill: Mr. Russo testified, after that was read to him, he would not have made such a statement.

[fol. 423] Mr. Cunningham: But I don't see where it contradicts his testimony.

The Court: Mark it.

The Clerk: R-1, formerly marked for identification, now marked in evidence.

[Received and marked Exhibit R-1.]

The Court: Mr. Clabault, if a witness, or a prospective witness, says something that you don't like, do you put it in the statement?

The Witness: Yes, sir.

The Court: You always put it in, do you?

The Witness: Yes, sir. Frankly, what they say is immaterial to me. That is their statement. If they want to sign it, it goes in, whether I agree with it or not.

The Court: Well, if you always do that you will never

get into trouble, that's all I can tell you. Very good, sir. I am glad you do put in everything, whether it helps you or doesn't help you, is that right?

The Witness: That's right.

Cross examination.

By Mr. Baker:

Q. How long have you been with the Shipowners' Claims Bureau as an investigator?

A. I am an adjuster now. I started with them in May of 1952.

Q. And before that were you with other companies as an adjuster or investigator?

A. No, sir.

Q. So that your experience is—since when, did you say?

A. 1952.

Q. What date?

A. May 16.

Q. So that you were with them only a period of less than [fol. 424] a year when this accident occurred and you went down to investigate this case?

A. Yes, sir.

Q. But you have had experience then in investigating cases for that period of anywhere from six to eight months?

A. Yes, sir.

Q. And you represented the vessel, did you not?

A. Yes.

Q. And you went to investigate the case for the purpose of determining whether or not the vessel was responsible for this accident?

A. That's right.

Q. And you went there to get the facts for that determination?

A. That's right.

Q. And were you acquainted with the various laws of responsibility of vessels, when they are responsible and when they are not responsible, at that time?

A. No, I was not.

Mr. O'Neill: I don't see why the witness must know that to take statements.

The Court: If he is acquainted with those laws he shouldn't waste his time being an investigator or an adjuster, either.

Mr. Baker: I mean does he know just generally what the law is, when a ship is responsible and when it is not responsible—at that time.

A. At the time I took those statements I didn't know.

Mr. O'Neill: Not even I know.

The Court: Do you think you do now, sir.

The Witness: Well, I have a little better idea.

The Court: That's a good answer.

The Witness: I have taken a few courses in insurance.

The Court: Sometimes that is a very difficult question [fol. 425] even for the Supreme Court to decide. I was wondering how you could do it as a layman.

By Mr. Baker:

Q. Now, when you went to investigate this accident to Mr. Skovgaard you said you went to see the men of the El Dorado people that were there?

A. Yes, on the Monday. I first went aboard the ship on Saturday.

Q. And when you went aboard the first time on the ship you interviewed the members of—the officers and the crew, did you not?

A. Yes.

Q. And who did you interview on board the vessel, first?

A. The Chief Mate.

Q. And that is the man who was on the witness stand?

A. Yes, sir.

Q. You spoke to him in detail?

A. Yes, I took a statement from him.

Q. And who else did you interview from the vessel?

A. The Third Mate.

Q. And he told you the details?

A. I took a statement from him.

Q. And who else did you interview from the vessel?

A. There was no one else on the vessel.

Q. And you saw them then—how long was it after the happening of this accident?

A. About 12 hours, about 2 o'clock in the afternoon I got aboard the vessel.

Q. And you then had a pretty good idea of just what had taken place insofar as the vessel's viewpoint.

A. I had a fair idea, because neither of the men who I interviewed had seen the accident, therefore they couldn't actually tell me what had taken place. So I still didn't [fol. 426] know.

Q. But they told you that they saw the oil that came out of this break all over the tank lids?

A. Yes.

Q. And the beams, did they not?

Mr. O'Neill: What has that got to do with this man taking a statement on Monday morning. There is no denial here that there was oil in the 'tween deck.

The Court: Well, I thought if there was one thing established in this case, there was a leak in the pipe and the oil went all over. I don't believe anybody denies that, do they?

Mr. Baker: We will see what it says in the statement, though.

The Court: We have proof here. What do I care what the statement says?

Mr. Baker: That's what I want to bring out.

By Mr. Baker:

Q. Did they tell you at that time that there was oil from this leak all over the decks and the "I" beams and so forth?

A. There was oil all over the decks, yes.

Q. So that a day or two later when you spoke to Russo did you have any reason why you had to, in talking to him, bring particular attention to the fact that the oil was a slight oil slick and not the oil from the original leak which had spread over this point, that any oil, if any, in this section, would be what leaked out of the pump and not due to an oil spill?

A. That's on the tank top, yes.

The Court: Just a minute. Hold it. I think Mr. O'Neill would like to be heard.

Mr. O'Neill: I think he is trying to have this witness [fol. 427] testify that he told Mr. Russo. Now, he can ask whether or not Mr. Russo told him, but not that he told Mr. Russo.

The Court: Well, he hasn't said that yet.

Mr. O'Neill: I thought he started the question that way.

The Court: What was the question he had put to him?

[Question read.]

The Court: Well, that would assume that he brought it to his attention. Ask him first whether he did or didn't.

By Mr. Baker:

Q. Did you bring it to his attention?

The Court: Or did he tell you that himself, that is what we want to know.

A. As far as I can recall, he told me that himself. He is talking in this case of the oil on the tank cover.

Q. Well, didn't the Chief Officer tell you there was oil all over the tank covers?

The Court: What has that got to do with what Mr. Russo told him?

A. Which he claims was wiped—the oil on the tank covers, in his statement he says was wiped up with rags. Therefore I probably brought out the question as to what oil was on the tank tops, if any, as he stated he wiped it up.

Q. Did you talk to him about what the Chief Officer told you, that there was oil all over these tank covers?

A. No, I am getting his version of the story, not the Chief Officer's version.

Q. And did you particularly endeavor, in talking to him, to bring out that there was only a slight oil slick there?

A. No.

Q. From the leak of the pump.

A. No.

Q. Rather than from the break in the pump?

A. No.

[fol. 428] Q. You didn't endeavor to bring that out?

A. I didn't endeavor to bring that out. I am telling what he said.

Q. Can I have the statement which you have taken from the Chief Officer?

Mr. Watson: It was given to you on the discovery inspection.

Mr. Baker: Oh, yes.

No further questions.

Mr. O'Neill: I have nothing further.

Mr. Cunningham: No questions by the respondent impleaded of this witness.

[Witness excused.]

Mr. O'Neill: Shall I continue with my case?

The Court: You may.

Frank Angrosina, called and sworn for the respondent, testified as follows:

The Clerk: May we have your name, please, sir?

The Witness: Frank Angrosina, A-n-g-r-o-s-i-n-a.

The Clerk: And your address, for the record?

The Witness: 777 Van Duzer Street, Staten Island.

Direct examination.

By Mr. O'Neill:

Q. Mr. Angrosina, by whom are you employed?

A. McRoberts Protective Agency.

Q. How long have you been employed by them?

A. Since 1939.

Q. And before that what was your business?

A. I was a chauffeur for the City of New York.

Q. Now, in December—December 5, particularly—1952, were you employed by McRoberts at that time?

A. Yes, sir.

[fol. 429] Q. And what vessel were you assigned to?
A. The Tungus.
Q. And what were your hours aboard that vessel?
A. Eleven to seven a.m.
Q. And what time did you get aboard?
A. About 10:30.
Q. The vessel was where at that time?
A. Tied up at the El Dorado dock.

The Court: Is that 10:30 a.m. or p.m.?
The Witness: P.M.

Q. Now, what are your duties aboard the vessel?
A. We are there for security reasons—fire, sabotage.
Q. You went, actually, on duty—was it 11 o'clock that night?
A. Yes, sir.
Q. And where were you stationed on the ship?
A. My job would be the gangway watch and to patrol the ship, test the lines, check lines, and check for smoking.
Q. And can you indicate on this photograph, Respondent's Exhibit 2, where the gangplank was, where it led ashore?
A. Yes, sir.
Q. Have you got the pencil?
A. The gangway would be away over here, up on the bridge deck, off the bridge deck.
Q. Over there.
A. Yes, sir.
Q. Will you just mark that?
A. I will have to go way back here.
Q. All right. Put a "G" there.

[Witness marks photograph.]

Q. Now, when was it first called to your attention that there was anything amiss in No. 3 hatch, when did you find out about No. 3 hatch in the course of your duties that night?
[fol. 430] A. Well, we usually make a tour of the ship—in particular where they are working, because there is sisal down in that hatch, and that is very highly inflammable. So my job would be to protect the cargo and see

that no one smoked, because any spark would set the ship afire. So my job was from gangway to this No. 3 hatch, particularly.

Q. Now, in the course of your duties, and watching for fire, and security risks, and other things, was there at any time—or what was the first time you heard of anything wrong with the equipment in No. 3 hatch?

A. Well, somewhere around 11:30 there was a little confusion due to the oil dripping.

Q. When you say the "oil drip" you mean by that the drip out of the oil pump itself?

A. Yes, sir.

Q. And did anything happen as a result of that?

A. Well, not at that time. Mr. Russo was there, and Mr. Donohue was there, and they went down and they made little adjustments on the pump, which I am not too familiar with pumps, and then we had a break there, somewhere around——

Q. When you say "we had a break there" what do you mean by that?

A. One of the lines broke, the air line that comes off the—the "L" off the pump. That's the outlet.

Q. Now, as a result of that, what happened?

A. Well, the oil splashed all over the tank, all over the cover, all over the cargo. In fact, it was just a fountain. So Mr. Russo and Mr. Donohue shut the pump off.

Q. Was anybody else there at that time?

A. No, sir.

Q. Now, after they shut the pump off, what happened?

A. They made repairs, and put the nipple in. They tried to start the pump again. In the meantime Mr. Sexton come aboard and there was an argument on the pump wouldn't take suction and the only way it would take suc-
[fol. 431] tion would be to lower that pump down in the hold. So Mr. Sexton and Mr. Russo and Donohue had a little dispute.

Now, I don't know whether I should say this, your Honor, the words exactly that were used in this argument——

The Court: You can say them. I have heard them all.

A. [continuing] Okay, sir. He said, "If I can't run this goddam job as I want, I am quitting." So he walked off the vessel——

The Court: Who is "he"?
The Witness: Mr. Sexton.
The Court: Yes, sir.

A. [continuing] He walked off the vessel and that was the end of Mr. Sexton for the evening.

By Mr. O'Neill:

Q. Now, you say they were trying to get suction?
A. That's right.
Q. Did they continue to try to get suction after Mr. Sexton left?
A. That's right.
Q. And that was Russo and Donohue?
A. Donohue.
Q. And about how long did they work, do you know?
A. Well, it was before 12:30, because at 12:30 I went down the hold and we sat down in front of this oil tank—Donohue and Russo—we had our sandwiches, and I had brought the News and the Mirror, which was the custom, and the three of us read that awaiting somebody to come and start the pump.
Q. And when did somebody come; were you there when somebody came?
A. Yes. By one o'clock I left the tank and went up on board, up to check my gangway. About 20 after one Skovgaard come and I says to him, "Carl, what are you doing here?" I was acquainted with him by being over there. So he give me a punch in the ribs and he said, "These [fol. 432] guys don't want to finish the job so I have to finish it for them."
With that we walked from the gangway to the hatch.
Q. Did he go down in the hatch?
A. Mr. Skovgaard came down this ladder here——
Q. Will you put a mark on that, showing the ladder?
A. This ladder here [indicating]. Do you want a "G" there?

Mr. O'Neill: No.
The Court: The starboard side ladder.
Mr. O'Neill: The starboard ladder.

Q. Now, when he went down, what did he do?
A. He went down the ladder, walked across this tank, stepped over to this tank, threw the switch on the pump several times—no suction.

The Court: Wait. He walked over this tank.
The Witness: This tank cover here.
The Court: You mean the tank cover, the starboard side?
The Witness: Yes, sir. And walked over to this tank.
The Court: And were the covers the way they are depicted on that photograph?
The Witness: Just the way they are now; yes, sir.
The Court: All right.

A. [continuing] And he threw the switch several times and no suction. So he came up the ladder again. I stood right here. He says, "Mr. Russo, get——"

The Court: The top of the ladder.

A. [continuing] "—get me a Stillson wrench." So Mr. Russo says, "What size?" Skovgaard says, "Any size."
With that I spoke a few words, Russo left and went out [fol. 433] on the dock.
Q. And then what?
A. By the time he went down to the dock Mr. Skovgaard came down this ladder, walked across here, walked under this hose——

The Court: Wait a minute. He walked over the tank cover, the starboard tank—go ahead—and then walked under the hose?
The Witness: Walked under the hose.
The Court: Now on the port side cover.
The Witness: That's right.

A. [continuing] —turned around. As he turned around his foot slipped and down he went. He went down on the hatch coaming and struck the right side of his head on the coaming as he went down, and landed in the oil.

In the meantime I blew my whistle and hollered for help. Mr. Russo and Mr. Donohue——

The Court: Who was there when you blew the whistle?
The Witness: No one at all.
The Court: Nobody from the crew?
The Witness: No, sir.
The Court: I mean from the El Dorado crew.
The Witness: No, sir.
The Court: So that you and Carl were there alone when this happened?
The Witness: Yes, sir.
The Court: Very good. Go ahead.

A. [continuing] In the meantime Mr. Russo was coming up and I hollered, "Carl fell down in the tank." Donohue was on the deck on the offshore side, very excited. So Mr. Russo went down and Mr. Donohue came down. I stood [fol. 434] on top. Mr. Russo jumped down the tank and with his foot located Mr. Skovgaard and dragged him over. In the meantime the Mate came out. They got him out.

So I in the meantime hollered off the dock, "Get an ambulance," which they did. And when they got him out they placed him in the basket and I went down on the dock. And as they were lowering the body down I pulled the basket away from the ship on account of the narrow string-piece. The oil kept running out of his mouth and blood coming out of his ears.

So in the meantime the Chinese doctor, a woman doctor—I said, "Doctor, he is breathing," because the oil was coming out, which I found out later was gas. So when she run—she pronounced him dead. That was it.

Q. And after that was done, what did you do then, as a guard on board?
A. I had to start my report, which I have.
Q. You made a report?
A. Forwarded it to my company.
Q. May I see that, please?
A. Yes, sir.

[Document handed to counsel.]

A. [continuing] The only thing, I made a mistake—in the excitement I put November instead of December on it.

The Court: Well, had Carl started to work on that pump before he fell in?

The Witness: He had went down and tried to start it and the suction was too high.

The Court: I don't want the whole story repeated.

The Witness: No, sir.

The Court: Had he applied the Stillson wrench to the pump before he fell in?

[fol. 435] The Witness: No, sir; he hadn't gotten the Stillson wrench. Mr. Russo had gone for it.

The Court: He was still waiting for the Stillson wrench.

The Witness: That's right.

By Mr. O'Neill:

Q. Now, did you go on to the pier after this happened, or just what did you do?

A. Yes, sir.

Q. And what did you do then?

A. Then I looked for—after we recovered the body, and covered it, and brought it to the head of the pier, waited for the coroner, and the police department, and so on.

Mr. Russo and Mr. Donohue went up to their office and changed their clothes. I walked up there and tried to get their names, and I wanted a piece of paper. They says, "We have none." Well, they give me this, one of their El Dorado sheets of paper, which shows Mr. Skovgaard's name, his age, his address, and Mr. Russo's and Mr. Donohue's name.

Mr. O'Neill: I will offer that in evidence.

Mr. Baker: I object to anything that is being offered in evidence to substantiate a witness; it is not admissible. He has testified to it. He is here to testify. Self-serving.

Mr. Cunningham: No objection.

The Court: What is harmful in marking it?

Mr. Baker: It isn't.

The Court: Then mark it, please.

Mr. Baker: There is no reason to clutter up the record.

The Court: It is cluttered up enough with unnecessary stuff, I will tell you that.

The Clerk: Marked R-7.

[fol. 436] [Received and marked Exhibit R-7.]

By Mr. O'Neill:

Q. And this is the report that you made at the time of the accident, is that it?

A. Yes, sir.

Mr. O'Neill: I will offer that.

[Document handed to counsel.]

Mr. Cunningham: I have no objection to this.

The Court: I don't understand this. If this man has testified substantially what he has in the report, what is the purpose of putting the report in?

Mr. O'Neill: To show that the report was made right after the accident, sir, as part of his duty aboard the ship. He is an outside guard——

The Court: I know he is.

Mr. O'Neill: —he was placed aboard the ship, and he has to make a report of these incidents.

Now, that is the report as he made it the following morning. That is the reason I offer the report.

The Court: Well, does anybody doubt he made the report?

Mr. Cunningham: I have no objection. Do you have an objection?

Mr. Baker: I personally feel, as your Honor expressed, that he has already testified to it, and he only can produce a paper to contradict him, not to substantiate him. But I am not going to object to it.

The Court: Mark it then.

The Clerk: Marked R-8 in evidence.

[Received and marked Exhibit R-8.]

[fol. 437] By Mr. O'Neill:

Q. Now, you say you were down in the 'tween deck and you were reading a paper down there, correct?

A. Yes, sir.

Q. Now, how many lights were there, do you recall?

A. Four, one on each corner of the hatch, two above.

Q. Now, after the accident occurred, there has been some testimony here that there was a light down the hold. That's down the tank.

A. Yes, sir.

Q. Do you know how that got there?

A. I lowered it at the time.

Q. Now, you left the ship at what time?

A. 6:30 the next morning.

Q. And you were never back aboard that ship since?

A. No, sir.

Q. And you didn't go back to work at El Dorado?

A. No, sir.

Mr. O'Neill: That is all.

The Court: Now, are you sure, Mr. Angrosina, that at the time that Carl fell in——

The Witness: Yes, sir.

The Court: —that you were the only person on that deck?

The Witness: Yes, sir.

The Court: Positive of that?

The Witness: Positive; yes, sir.

The Court: There will be a five-minute recess.

[Short recess.]

Mr. Baker: Can we have the last question?

[Record read.]

[fol. 438] Mr. George: If your Honor please, I am merely taking this opportunity, with the Court's permission, to help me learn something about admiralty law.

The Court: Well, I don't know if Mr. George is familiar with the practice here, but they generally do not permit more than one lawyer to try a case, except under exceptional circumstances, where counsel represents that he is very familiar with a certain line of questions which he is going to put to the witness, because he has investigated and prepared himself for it. And sometimes other counsel object to more than one lawyer. Do you gentlemen have any objection to Mr. George asking a few questions?

Mr. Cunningham: I have none.

Mr. O'Neill: No.

Cross examination.

By Mr. George:

Q. Mr. Angrosina, by whom are you now employed?

A. McRoberts Protective Agency.

Q. How long have you been engaged in this kind of work?

A. Since 1939.

Q. And, Mr. Angrosina, is it the truth that you stated to his Honor, Judge Modarelli, that at the time of the accident, at the time Mr. Skovgaard fell into the tank, that you were the only other person there?

A. That is right.

Q. All right. This statement that you presented, and which is marked Exhibit R-8, was written in your hand?

A. Yes, sir.

Q. And signed by you?

A. Yes, sir.

Q. Will you tell his Honor, then, please, in the light of your recent statement that you were the only person present at the time Mr. Skovgaard fell into the hatch what you [fol. 439] meant by this report that you made to your employer, "On the morning of November 6, 1952"—and we will accept the correction to December 6, 1952—"at 1:25 a.m. while directing his men Mr. Skovgaard fell into the tank," what did you mean by that?

A. He directed his men to go and get him a Stillson wrench.

Q. Yes. They were there, weren't they?

A. At that time.

Q. Yes. And they were there at the time that the accident occurred, weren't they?

A. No, sir.

Q. Are you sure?

A. Positive.

Q. Mr. Russo wasn't there, was he?

A. No, sir; he was sent for the Stillson wrench.

Q. And where was Mr. Russo at the time?

A. Gone to the dock to pick up a Stillson wrench.

Q. Oh, he did go there?

A. That's right.

Q. And how about Mr. Donohue?

A. Mr. Donohue was on the offside of the deck, away over on the other side.

Q. How far away from the tank?

A. Well, now, there is a distance of at least, I will say, 20 feet from the edge of this tank to the shell of the ship.

Q. You don't consider that that was within sufficient proximity of the place of the accident?

A. No, sir; he could not see what was going on in that hatch if he had spyglasses.

Q. Could you see him?

A. Yes, sir; I was standing opposite the hatch.

Q. Could he see you?

A. Yes, sir.

Q. And you were standing right by the hatch?

A. Right at the coaming.

The Court: Wait. Let's see where you were stand-
[fol. 440] ing.

The Witness: Right here [indicating], right at this hatch coaming.

By Mr. George:

Q. And where was Mr. Donohue?

A. You can't get a view of it. This is the hatch and from here to the end of the hatch is about 15, 20 feet. He was standing on the offshore side of the ship, looking at the water.

The Court: On the port side of the ship. Do you know that he was looking at the water?

The Witness: Yes, I was looking here [indicating].

The Court: You were opposite him?

The Witness: Right opposite him.

By Mr. George:

Q. And you were taking particular notice that he was looking at the water?

A. Not particularly to him, looking in general. That's

my job, to look for the safety of the men working, and the safety of the ship, and——

Q. Then it was your duty to take particular note as to what every person in the vicinity was looking at?

A. As far as I could see, yes.

Q. And you noted that Mr. Donohue was looking at the water?

A. That's right.

Q. And what was Mr. Russo looking at?

A. Nothing. He had been sent down for a Stillson wrench and was on his way up when Mr. Skovgaard fell.

Q. How do you know he was on his way up?

A. Because he was coming through from the gangway to the bulkhead, and I hollered, "Mr. Skovgaard fell down the oil tank."

[fol. 441] Q. Yes. Now, what did you do the moment Mr. Skovgaard fell down into the tank?

A. Hollered for help, that the man had fallen overboard.

Q. Is that all you did?

A. That's all I could do.

Q. Didn't you send for an ambulance?

A. I hollered on the dock for an ambulance, "Get an ambulance."

Q. And did you go for it?

A. No, sir; I did not.

Q. And what happened after that?

A. What do you mean?

Q. After you hollered.

A. By that time Mr. Russo had come to the hatch. Mr. Donohue turned around. They both went down the ladder. Mr. Russo jumped in the tank, looked for——

Q. Have you finished?

A. No, sir.

Q. All right. Go on, finish.

A. Mr. Russo jumped in the tank, and with his feet he located Mr. Skovgaard, pulled him over to here. And in the meantime the Mate had come out, Mr. Donohue went down, and they got Skovgaard out, brought him out to the first landing, where he struck his head, and laid him there between—there is a little space between the bulkhead down below and that tank.

Q. Mr. Angrosina, did you find out since the accident how deep the tank was?

A. No, sir; I have no occasion to find out.

Q. Have you heard about it?

A. No, sir.

Q. You have no knowledge about anything about the depth of the tank?

A. No, sir.

Q. You knew what was in there?

A. Yes, sir.

Q. What?

A. Cocoanut oil at 160 degrees, which Mr. Donohue told me, and Mr. Russo.

Q. When did they tell you that?

A. While we were having our lunch, sitting down here reading the News and the Mirror.

[fol. 442] Q. Before or after the accident?

A. That was at 12:30.

Q. Before the accident?

A. Yes, sir.

Q. And how far from the tank were you having your sandwich?

A. Six inches from this tank, six inches from it.

Q. And while you were eating the sandwich did the accident occur?

A. No, sir.

Q. How long after?

A. The accident occurred at 1:20 and at 1:50 Mr. Skovgaard was declared dead.

Q. By the way, do you remember that it was——

A. 1:25.

Q. I say, do you remember that?

A. Yes, sir; we have to take notes of everything that goes on on that ship for our own benefit.

Q. Do you remember that it was 1:25 based solely on recollection?

A. No, sir; on the clock.

Q. Of course, of course. I mean, did you have to look up any records to find out that it was 1:25 so that you could tell it to the——

A. When anything occurs on a ship——

The Court: He asked you a simple question.

The Witness: Yes, sir; I want to answer.

The Court: You don't have to make a big speech about it. The answer is either yes or no. Did you look up in the memorandum to refresh your memory that it was 1:25?

The Witness: No, sir.

The Court: You have an independent recollection of that?

The Witness: Yes, sir.

The Court: That is his answer, Mr. George.

Mr. George: Yes, it is.

[fol. 443] The Court: It is remarkable.

Mr. George: Yes, it is, your Honor.

By Mr. George:

Q. Now, it has been testified here, Mr. Angrosina, that the oil level in the tank was about eight feet and that the distance from the top of the tank to the oil level was some 21 or 22 feet, or a total of about 30 feet in depth. You heard that, didn't you?

A. Yes, sir.

Q. And yet you tell his Honor that when the accident occurred and you hollered for help, or whatever you did holler, and knowing from Mr. Russo and Mr. Donohue that there was hot oil in that tank, which had a depth of 22 feet to the oil level, that Mr. Russo then jumped into the tank?

A. Yes, sir.

Q. He didn't go down the ladder.

A. He certainly did. He went down——

Q. Now, which was it, did he jump or——

A. Now, just a second. I said that Mr. Russo went down that tank and jumped into the oil from the level of that one oil tank. He didn't jump from the top.

Q. Well, did he jump into the oil tank?

A. He certainly did.

Q. I see. And do you know what the depth of the jump was?

A. Well, according to what they said, it was six feet.

Q. Six feet?

A. That's his statement.

Q. He didn't walk down the ladder to get to where Mr. Skovgaard was, but he jumped into the oil?

A. That is right.

Q. All right. From the moment that Mr. Skovgaard fell into the tank, Mr. Angrosina, how much time elapsed between the falling into the tank and bringing the body out?

A. I should say about 10 minutes.

[fol. 444] Q. About 10 minutes?

A. Yes, sir.

Q. How much time elapsed between the time that you saw Mr. Skovgaard fall into the tank and the time that Mr. Russo jumped into the tank?

A. Well, now, that's a hard question to answer.

Q. Oh, well——

A. In excitement like that you don't check whether it takes minutes or hours. He immediately went down the ladder, and as he went down the ladder he jumped into the tank.

Q. Oh, come now, because you didn't find there was too much excitement to be able to note here, and tell his Honor here, after three years—three years—that it was 1:25 a.m., and based solely on your keen recollection——

A. Yes, sir.

Q. Yes. —but you can't tell the Court the details as to how much time elapsed between the time that Mr. Skovgaard fell into the tank and Mr. Russo jumped in for him?

A. No, I can't give you that exact.

Q. Well, approximately?

A. Well, now, that's a hard thing for anyone to say.

Q. Was it a minute?

A. I can't say.

Q. Was it five minutes?

A. I can't say.

Q. Was it 20 minutes?

A. No, sir.

Q. Was it 10 seconds?

A. Mr. Skovgaard, from the time of falling to coming out, was 10 minutes in that oil, I said.

Q. I am trying to find out how much time elapsed——

A. That I cannot answer.

Q. Why not——
A. Because——
Q. —you were there?
A. Yes, I was there. And there was excitement there. And I can't look at a watch for everything that happens.

The Court: All that he is asking for is an approxima-
[fol. 445] tion. Can't you approximate, two minutes, three minutes?
The Witness: About two or three minutes.
The Court: All right. That's all he is asking you if you can recall.

By Mr. George:

Q. Now, where was Mr. Sexton at the time?
A. He was not there.
Q. Did you make any statement to anyone, other than this paper which is marked R-8?
A. What do you mean by a statement?
Q. Just exactly what I said.
A. Are you referring to a written statement?
Q. Yes.
A. No, sir.
Q. Did you make verbal statements?
A. Yes, sir.
Q. To whom?
A. About three and a half weeks ago I was called up to 80 Broad Street to see Mr. Watson.
Q. Yes. Now, for whom?
A. That I don't know.
Q. In reference to what?
A. In reference to this accident.
Q. On behalf of the ship?
A. No, sir; in reference to Mr. Skovgaard.
Q. All right. Did you give the statement right then and there?
A. Verbally.
Q. Exactly as you have told his Honor here today?
A. Yes, sir.
Q. When you were asked to come there did you know what you were asked to come there for?

The Witness: Can I answer that?

[fol. 446] The Court: Certainly, if you can.

A. They telephoned——

Q. Yes or no is the question.

Mr. O'Neill: It can't be yes or no.

Q. Did you know what you were being asked there for? And the answer is yes or no.

A. Yes, I did.

Q. All right. Did you bring any information with you other than what you had in your——

A. Outside of that thing there, that thing I had with me. I carry it at all times.

Q. And did you find it necessary to refer to this paper, R-8, in order to refresh your recollection?

A. No, sir; I handed that paper to Mr. Watson and——

The Court: That was a simple question. Will you read the question?

[Question read.]

The Court: The answer is yes or no.

A. No, sir.

Q. So that what you told Mr. Watson, or anybody else, more than two years after the accident, you relied exclusively on your memory?

A. That's right.

Q. Tell me, how often do you make reports to the McRoberts Protective Agency concerning your business or work?

A. Just in case of an accident.

Q. I say, how often have you done it?

A. I can't say. We may get one a year, we may get five a year, we may not get any for 10 years.

Q. How long have you been engaged in this work?

A. Since 1939.

Q. Now, that's 16 years, and you have made quite a number of reports?

[fol. 447] A. Yes, sir.

Q. And can you remember the details of all of them without referring to the reports that you make?

A. Yes, sir. Do you want me to recite them?
Q. What?
A. Yes, sir.

The Court: Why are you volunteering to recite them?
The Witness: He asked me a question, your Honor.
The Court: You answer yes or no and you will get in less trouble.

A. Yes, sir.

Mr. George: If your Honor please, may I be permitted to ask this question:

Q. Can you recite this one?
A. Yes, sir.
Q. Let me hear it, please.

The Court: Let me have it and see how it goes.

[Document handed to the Court.]

The Court: Go ahead, sir. Let's see how good you are.

A. Well, on the night of the accident Mr. Skovgaard boarded the ship around 1:25. As he come to the gangway I said, "What are you doing here, Carl?" He says, "Oh, I have got to fix this pump."

So I walked over to the hatch with him. Mr. Skovgaard went down the ladder. He was down there and tried the pump two or three times. He come up the ladder and he says, "Russo, pick me up a Stillson wrench." Mr. Russo says, "What size?" He says, "Any size."

The Court: Now, just hold that. All that is not here.
The Witness: No, sir.
The Court: He asked you whether you could recite what is in here. Do you know what that means?
The Witness: Yes, sir.
[fol. 448] The Court: Word for word, which you are not doing.
The Witness: That's pretty hard.
The Court: We both thought you would be a remarkable man if you could really recite what is in here word for word.
The Witness: I haven't read it.

The Court: I am not asking you to tell me why you can't. I had my doubts that you could, so did everybody else.

Now he verifies it. He didn't recite what is in there.

By Mr. George:

Q. Now, Mr. Angrosina, what you have attempted to tell us again, while Judge Modarelli was holding this paper, R-8, is identical with what you testified here when called by Mr. O'Neill, isn't that so?

A. Yes, sir.

Q. Word for word.

A. That there?

Q. No, no. What you just told the Court.

A. That's right.

Q. Word for word as to what you told Mr. O'Neill, isn't that so?

A. That's right.

Q. Now, tell us what other accident you found it necessary to make a report on in the year 1952.

Mr. O'Neill: I would limit that to a death accident, somebody he knew.

Mr. George: No, no.

Mr. O'Neill: He has testified he knew this man. And this is a death accident.

The Court: There is no doubt he knew him. He called him Carl when he came aboard. He can test his credibility. Did you have any other accidents in 1952?

The Witness: Not to my recollection, no death.

[fol. 449] The Court: All right. He said he had no death actions in 1952.

By Mr. George:

Q. Did you have any death case in 1953 that you reported on?

A. No, sir.

Q. When was the last death matter that you had any occasion to render a report on?

A. 1955.

Q. 1955. When?
A. That was in October.

The Court: You mean last month?
The Witness: Yes, sir.

Q. Do you remember all the details of that?
A. Yes, sir.
Q. Did you make a report on it?
A. Yes, sir.
Q. I see. Similar to this one?
A. I wouldn't say similar. This accident is different.
Q. No, I mean in a similar form or procedure.
A. Yes, sir.
Q. Tell me this, Mr. Angrosina, how much territory does your job require you to cover?
A. The whole ship, if necessary.
Q. No, no, no. I mean how many ships, or how many piers, how many docks, how many municipalities; I mean, what is your tour of duty?

The Court: Do you mean his district, sir?
Mr. George: Yes.
The Court: What district do you cover?
The Witness: We cover all of New Jersey from Caven's Point to Leonardo. That's in South Jersey. Then we cover—on the New York side, we cover Pier 84, Pier 42, Pier 10. Then we cover all the Bush docks in Brooklyn, [fol. 450] we go to 138th Street oil docks, we cover all the New York docks, I'd say 90 per cent of all the New York docks in Brooklyn.

Q. And you do that personally, too, don't you?
A. Yes, sir.

Mr. O'Neill: I don't think the witness understands that question. You mean he works at these various places.
Mr. George: Yes.
Mr. O'Neill: That's different.
The Court: I understand what he means, and so does Mr. George. We know that he couldn't possibly cover all that area at one time.

By Mr. George:

Q. And you have occasion to come in contact with hundreds of ships, don't you?

A. Well, hundreds is a big item, to say hundreds of ships.

Q. Of course it is, but you have given us a big number of items as to the territory that you cover. Well, a great many ships?

A. Yes, sir.

Q. And many thousands of members of crews?

A. Yes.

Q. And yet you tell the Court that you knew Mr. Skovgaard in this case?

A. Definitely.

Q. How long did you know him?

A. For about a year.

Q. Where did you first meet him?

A. In El Dorado.

Q. Yes. And how frequently did you see him?

A. Well, sometimes we got the ship a month, sometimes twice, sometimes we didn't get him for two or three months.

Q. Do you know where he lived?

A. No, sir.

Q. Did you know Mr. Russo at that time?

A. Yes, sir.

Q. And did you know Mr. Donohue?

A. Yes, sir.

[fol. 451] Q. Very well?

A. Well, actually, from working in the plant on and off.

Q. Do you know Mr. Sexton?

A. Yes, sir.

Q. Do you see him here?

A. Yes, sir. Right there. The reddish hair.

Q. He wasn't pointed out to you, was he, by somebody?

A. No, sir.

Mr. George: That is all. Thank you, Judge.

Cross examination.

By Mr. Cunningham:

Q. What time did you say you came aboard that night?

A. About 10:30.

Q. When you came aboard, how long after you came aboard did you make an investigation of the No. 3 hatch?

A. Immediately. That's our job.

Q. Was there anyone down there with the pump at that time?

A. Down with the pump; no, sir.

Q. Was the pump working at that time without any leak?

A. No, I couldn't say about leak, the pump was working.

Q. Well, did you notice there was a leak at 11:30?

A. Yes, sir.

Q. And was this a leak where the oil squirted all over the place?

A. When that nipple busted, it did.

Q. At 11:30, what kind of a leak?

A. I don't have a recollection of the exact time. It was leaking on the flange, that I know.

Q. Well, when you say there was a leak at 11:30, was that the leak that squirted the oil all over the deck?

A. That was about 11:30, when that nipple broke.

Q. Now, did you say that there had been a leak before this?

A. Yes, sir.

[fol. 452] Q. Before the nipple broke?

A. On the flange.

Q. And what time was that leak?

A. When I went aboard. I checked it, checked my cargo, checked everything, and this was dripping into the tank. There was a bucket there.

Q. There was a bucket there under the pump so the oil could leak in the bucket?

A. That's right.

Q. And there was no one there at all?

A. No, sir.

Q. How many times between 10:30 and 11:30 did you go down to No. 3 hatch?

A. Well, two or three times.

Q. And did you go into other hatches as well?

A. No, sir.

Q. Only No. 3?

A. That's right.

Q. That's because they were working cargo?

A. That's right.

Q. And when you went in No. 3 did you see anyone at the pump, at any time?

A. Yes, sir.

Q. When?

A. As I say, we went down there with Mr. Russo and Mr. Donohue——

Q. Can you tell me when, please?

A. That I can't tell you, the time.

Q. Well, was it the second time you went down, or the third time you went down?

A. The second time we went down Mr. Russo and Mr. Donohue were down in the tank.

Q. I am talking about the time between the time you came aboard the ship at 10:30 and 11:30, when you said the nipple broke. You say you went down two or three times between that time.

A. That's right.

Q. When did you first see someone at the pump?

A. When they repaired that leak, went down to put grease in it.

[fol. 453] Q. The other two or three times you went down there was no one there?

A. No, sir.

Q. Did you ever see Mr. Russo standing at the pump?

A. Yes.

Q. Did you ever see him standing at the pump before the time that the pump broke and the oil leaked?

A. Yes, he was down there.

Q. Then you saw him when you had gone down before the break.

Mr. O'Neill: He didn't say he saw him when he went down, he said he saw him down there. He was up on deck, probably.

Q. Oh, you were up on deck and saw him?

A. Yes, sir.

Q. Where were you standing when this accident happened to Mr. Skovgaard?

A. Right on this coaming, right at this ladder [indicating].

Q. Up on the main deck?

A. Yes, sir; one deck above.

Q. But you were on the main deck looking down?

A. That's right.

Q. Did you see anyone across the deck—that is, on the port side of the main deck?

A. Mr. Donohue.

Q. Was there anyone else?

A. No, sir.

Q. Did you see Mr. Sexton there?

A. No, sir.

Q. Do you know where Mr. Sexton was?

A. No, sir.

Q. Did you actually see Mr. Skovgaard fall?

A. Yes, sir.

Q. Did he grab anything on the way down?

A. There was nothing to grab.

Q. Did he grab anything on the way down?

A. No, sir.

[fol. 454] Mr. O'Neill: He answered the question, sir.

The Court: I suppose it is implicit when he says there was nothing to grab that he didn't grab anything.

Mr. Cunningham: I wanted the answer.

The Court: He didn't ask whether there was anything to grab.

Mr. O'Neill: All right.

By Mr. Cunningham:

Q. Now, when you saw the accident occur you blew a whistle, did you?

A. Yes, sir.

Q. And how long was it before anyone came?

A. Within a minute or so, less than a minute, Mr. Russo approached the tank. I says, "Carl fell down." Mr. Donohue came over. Down the ladder they went.

Q. Did Mr. Russo get there before Mr. Donohue?

A. Yes, sir.

Q. Where did he approach?

A. From the gangway, with the wrench in his hand.

Q. Now, after this break at 11:30, did you see Mr. Russo and Mr. Donohue down at the pump?

A. That's right.

Q. And you saw them working on it down there?

A. That's right.

Q. Where were you at that time, up on the main deck?

A. On the hatch coaming, on the main deck.

Q. On the main deck?

A. Yes.

Q. You were watching them work on the pump?

A. Yes, sir.

Q. And did anyone else come aboard to help them?

A. No, sir.

[fol. 455] Q. There was no one else except the two of them?

A. That's right.

Q. Are you sure of that?

A. Positive.

Q. No one else came on board?

A. No, sir.

Q. The two of them were working on the pump all the time?

A. That's right.

Q. They were working on the pump there until Mr. Skovgaard came on board?

A. No, sir.

Q. Was Mr. Skovgaard the first person that came on board after they were working on the pump?

Mr. O'Neill: What time?

Q. [continuing] After they were working on the pump at 11:30?

A. No, sir.

Q. Who was the first one?

A. No one but Mr. Russo and Mr. Donohue.

Q. Mr. Angrosina, didn't you testify on direct examination that Mr. Sexton came on board?

A. At what time?

Q. Did you forget that?

A. At what time?

Q. Between 11:30 and 12:30, while Mr. Donohue and Mr. Russo were working on the pump, did Mr. Sexton come on board?

A. Yes, at that time, yes.

Q. That's the same time we are talking about.

Mr. O'Neill: No, it isn't.

Mr. Cunningham: Yes, it is.

Mr. O'Neill: No, sir. I submit that "this time" and "that time"—let's signify the time.

Mr. Cunningham: I am signifying the time.

Q. Between 11:30 and 12:30.

A. Yes.

Q. Did Mr. Sexton come on board between 11:30 and 12:30?

[fol. 456] A. Between 11:30 and 12.

Q. 11:30 and 12.

A. That's right.

Q. That's while Mr. Russo and Mr. Donohue were down working on the pump?

A. Yes, sir.

Q. So Mr. Sexton did come aboard in that time?

A. Yes, sir.

Q. Then there were three men down working on the pump?

A. There was two men.

Q. Didn't Mr. Sexton go down?

A. No, sir.

Q. When was the first time that you went down?

A. I went down around half past ten, 11 o'clock, when I come aboard to make an inspection, see what cargo was there.

The Court: Don't go through that again.

Q. What time did you go down after 11:30?

A. Around 12:30.

Q. And you went down at 12:30 to have lunch?

A. That's right.

Q. Did you go down at all during that hour between 11:30 and 12:30?

A. Yes, sir.

Q. Well, I asked you what was the first time you went down after 11:30 and you said 12:30, is that wrong?

A. I don't get the question.

Q. What was the first time you went down into the hold after 11:30?

A. At 12:30.

Q. Now, did you make any inspections in the No. 3 shelter deck between 11:30 and 12:30?

A. Inspections with reference to——

Q. Did you go down there to make any inspection, during that hour?

A. No, sir; I went down to eat my lunch.

[fol. 457] Q. But between 10:30 and 11:30 you went down two or three times?

A. No, sir; I did not.

Q. I thought you said that between 10:30 and 11:30 you had gone down into No. 3 twice.

A. That's right.

Q. So that in that hour you went down twice?

A. That's right.

Q. Between 11:30 and 12:30 you didn't go down at all?

A. I said—no, between 11:30 and 12:30, no.

Q. You didn't go down at all?

A. No, sir.

Q. What were you doing in that time?

A. Patroling the deck.

Q. Did you have to patrol the deck between 10:30 and 11:30, as well?

A. At all times, when you get the opportunity.

Q. Now, when you went down at 12:30 was Mr. Russo and Mr. Donohue still there?

A. At 12:30; yes, sir.

Q. And did you sit down and have lunch with them?

A. Yes, sir.

Q. Where did you sit and have lunch?

A. By the front of the tank——

Q. You are indicating something and we have to show what you are indicating. That's all right. You are now

referring to a photograph, R-2, and I am asking where you sat down to have lunch?

A. Right up against that bulkhead [indicating].

Q. And you are indicating the after-bulkhead?

A. That's right.

Q. Aft of the port tank?

A. That's right.

Q. And did you sit down there?

A. Yes, we did.

Q. You sat right down on the deck, the three of you?

A. No, there were hatch covers.

[fol. 458] Q. You sat down on the hatch covers?

A. That's right.

Q. Did they eat lunch with you, Mr. Donohue and Mr. Russo?

A. We all had our sandwiches, the three of us.

Q. You brought coffee down for them?

A. No, I did not.

Q. Did you say you brought coffee down for yourself?

A. I did not. I said the stewardess gave me a cup of coffee.

Q. And after you were down there having your lunch did you then leave, and leave the men down there to work on the pump?

A. We all went up.

Q. The three of you went up?

A. That's right.

Q. They didn't continue to work on the pump at all?

A. There was no work to be done.

Q. Did——

A. No, sir.

Q. So between 12:30 and when Mr. Skovgaard came aboard, at about 1:25, there was no one down in the shelter deck working on the pump, is that correct?

A. That's correct.

Q. And in that 55 minutes how many times did you go down into the No. 3 shelter deck to make an inspection? Now I am talking about between 12:30 and 1:25.

A. I didn't go down.

Q. You didn't go down at all?

A. No, sir.

Q. The only time you went down to make an inspection in the shelter deck was the two times you went down in the first hour, is that correct?

A. That's right.

Q. After that you didn't go down at all?

A. No, sir.

Q. What did you do between 12:30 and 1:25, did you stand up on the main deck and watch the pump?

A. No, sir.

Q. What did you do?

A. I checked my gangway up, lowered it, raised it—as necessary—there were tides; made my inspection of lines, while there was no activity, and came back.

[fol. 459] Q. And then you were standing at the gangway, too, because you are really a gangway watch, aren't you?

A. No, we are a security watch. That comprises the whole ship.

Q. Isn't it part of your job to make a check of everyone who comes on board?

A. No, sir; not on all lines.

Q. On this line?

A. No, sir.

Q. Do you keep a record of the people who come on board?

A. No, sir; outside of checking their identification.

Q. Well, that's what I mean, when they come on board you check their identification, don't you?

A. We keep no record.

Q. But you have to check their identification?

A. Yes, sir.

Q. That is part of your job?

A. Yes.

Q. So that you have to see people coming up the gangway?

A. That's right.

Q. And you have to make a record of people that leave the ship, don't you?

A. No, sir.

Q. Now, during the 55 minutes between 12:30 and 1:25

did you stay in the gangway and check people as they came aboard?

A. No, sir.

Q. There was no one coming aboard?

A. No, sir.

Q. How do you know; were you there?

A. Because I could watch from that hatch to the gangway and see anyone coming on board.

Q. Could you watch from the forward lines?

A. No, I didn't say anything about lines.

Q. Did you check the forward lines?

A. I did.

Q. Could you see anyone coming aboard while you were at the forward lines?

A. Yes, sir.

[fol. 460] Q. Do you know how long this ship is?

A. No, I don't know.

Q. Do you know that it is approximately 439 feet long?

A. I presume it is.

Q. And do you mean to tell me that you could see from the after end—or forward end someone coming up the gangway?

A. Yes, sir.

Q. Now, is your testimony, sir, that you could see the gangway regardless of where you were on the ship?

A. No, no, no.

Q. All right.

A. If I was on the dock side I could see that ship forward or aft—that gangway.

Q. But there were times in the course of your tour of the ship when you couldn't see the gangway?

A. No.

Q. There wasn't?

A. No, sir.

The Court: Did you never go on the water side?

The Witness: No, sir; I have no occasion.

The Court: No occasion.

The Witness: No, sir.

By Mr. Cunningham:

Q. So that while you are making your tour of the ship at all times you have your eye on the gangway to make sure no one comes on board without identification?

A. Yes, sir; that's right.

Q. About how long would you say this tour took?

A. About eight to 10 minutes.

Q. Then you go back to the gangway?

A. Back to the gangway, back to the hatch. If they were working, we have to be on the hatch.

Q. Now, did you see Russo and Donohue leave the ship after they came up from the shelter deck after you three had lunch down there?

[fol. 461] A. No, they didn't leave the ship at that time.

Q. They both stayed on board?

A. That's right.

Q. But they stayed up on the main deck?

A. That's right.

Q. No one down at the pump at all?

A. No one.

Q. What did they do?

A. Waiting around for somebody to come back to start the pump.

Q. They didn't do anything.

A. No, sir.

Q. And the first person that came aboard then was Mr. Skovgaard?

A. That's right.

Q. Did Mr. Skovgaard come aboard with Mr. Sexton?

A. No, sir.

Q. Now, was there anyone else in the vicinity at that time—that is, between 12:30 and 1:25, after the break in the oil line now—was there anyone else up on the main deck?

A. No.

Q. Between 11:30, when the oil line broke, and 12:30, did you see anyone up on the main deck besides Mr. Russo and Mr. Sexton?

A. Mr. Donohue was there.

Q. I'm sorry. Besides Mr. Russo and Mr. Donohue did you see anyone else up there?

A. Mr. Sexton came up there between that time.

Q. Did you see anyone talking with Mr. Sexton up on the main deck?

A. Yes.

Q. Who was that?

A. Mr. Russo and Mr. Donohue.

Q. Did you see anyone else talking with Mr. Sexton up on the main deck?

A. No, sir.

Q. Are you absolutely certain of that?

A. Positive.

Q. Were you here when Mr. Folkman said he had a conversation with Mr. Sexton up on the main deck; did you hear that?

[fol. 462] Mr. O'Neill: I object to that. Arguing with the witness. The witness said he didn't see it, that's all.

Mr. Cunningham: The witness said there was no one else there.

The Court: Yes, you can ask him specifically did he see Mr. Folkman talking to anyone.

By Mr. Cunningham:

Q. Did you see Mr. Folkman talk to Mr. Sexton up on the main deck?

A. No, sir.

The Court: It is obvious that if he didn't see him he couldn't mention the conversation.

Mr. O'Neill: That's right. That's why I said it was getting argumentative.

The Court: You are not intimating that Mr. Cunningham doesn't appear to believe this man in every respect, are you?

Mr. O'Neill: I can understand why he wouldn't want to.

Mr. Cunningham: If your Honor please, I want to believe everybody.

Q. Did you know that there was an investigation made by several people concerning this accident to Mr. Skovgaard?

A. No, sir.

Q. How long did you stay on the ship after the accident?
A. Till 6:30 in the morning, the time my relief come.
Q. Did the police come on board?
A. The police come on the dock.
Q. Did you go and talk to the police?
A. Yes, sir.
Q. Did they take your statement?
A. No, sir.
Q. Did you tell them what you are telling us now?
A. They didn't ask me.
[fol. 463] Q. Did you tell them?
A. No, sir.
Q. You knew that you were the only man that saw this accident, but you didn't tell the police what happened; is that your testimony?
A. That is right.

Mr. Cunningham: No further questions.

Redirect examination.

By Mr. O'Neill:

Q. There has been a lot of talk about that gangway. Was there a light over the gangway?
A. Yes, sir.

Mr. O'Neill: That is all.
Mr. George: I just ask the Court's permission for one question on recross.
The Court: Yes, sir.

Recross examination.

By Mr. George:

Q. Will you please explain to the Court why, when we had difficulty in ascertaining from you how much time elapsed between the time that Mr. Skovgaard fell into the tank and Mr. Russo jumped into the tank after him, and you told the Court finally that it was about two minutes—was that true?
A. That's true.

Q. Now, how do you reconcile that statement with what you told Mr. Cunningham, or told the Court under Mr. Cunningham's cross examination, that it was less than a minute; will you try to explain that to the Court?

Mr. O'Neill: I object to that. That is for the Court to pass on.

The Court: I suppose I should take into consideration the realities of the situation. One minute or two minutes—pretty pronto, at that. I don't suppose he can reconcile it, anyway. He didn't say strictly two minutes, I suggested maybe two minutes.

[fol. 464] Mr. George: I will withdraw the question.

The Court: Yes. It is hard to pin it down.

I am interested in one thing. You watched Russo go down into this tank that Mr. Skovgaard fell into, is that right?

The Witness: Yes.

The Court: You watched him go down?

The Witness: Yes.

The Court: He went down a ladder?

The Witness: No, sir.

The Court: What did he go down?

The Witness: Jumped right into it.

The Court: He jumped into the tank, is that right?

The Witness: Yes, sir.

The Court: That is all I want to know.

Mr. O'Neill: Wait a minute now.

Redirect examination.

By Mr. O'Neill:

Q. What ladder did Mr. Russo go down?

A. There is a ladder inside this tank goes down. He went down the ladder to the first landing, where the oil was, then jumped in the last one.

The Court: Now, just hold it a minute. Will you please repeat to this gentleman the question I asked him.

[Record read as follows: "The Court: I am interested in one thing. You watched Russo go down into this tank that Mr. Skovgaard fell into, is that right?

"The Witness: Yes.
"The Court: You watched him go down?
"The Witness: Yes.
"The Court: He went down a ladder?
[fol. 465] "The Witness: No, sir."]

The Court: Hold it. How do you reconcile that with what you just told us?

The Witness: There are two ladders there, there are two landings.

The Court: I didn't make any specific distinction which ladder. I asked you if he went down a ladder, and you said, categorically, no.

The Witness: I misunderstood.

The Court: Then please don't misunderstand. I have to judge a very difficult case and I have got to rely on witnesses.

So you did watch him go down a ladder?

The Witness: Yes, sir.

The Court: Into the tank, is that right?

The Witness: Yes, sir.

The Court: There was abundant light there for you to see him going down?

The Witness: Yes, sir.

The Court: Sufficient light?

The Witness: Yes, sir.

The Court: Now, then, when he got near the oil level, what did he do then?

The Witness: Then he jumped into the tank.

The Court: Now we better define terms. You mean he actually jumped into the hot oil?

The Witness: Yes, sir.

The Court: Did you hear the testimony in this case?

The Witness: Yes, sir.

The Court: That there was eight feet of hot oil in that [fol. 466] tank?

The Witness: Yes, sir.

The Court: Was Russo's head submerged in the oil?

The Witness: Yes, sir.

The Court: Is that so?

The Witness: Yes, sir.

The Court: Now, you understand my English, submerged in the oil.

The Witness: Yes, sir; I do, your Honor.

The Court: His head was under the level of the oil, right?

The Witness: That's right.

The Court: And could you watch him working in that oil?

The Witness: No, he kept jumping up and they finally threw a rope to him, and he hung on, and with his foot dragged him over to the end of that coaming in the tank.

The Court: He was jumping up and down—Mr. Russo?

The Witness: Yes, sir.

The Court: Could you see his head bobbing out of the oil?

The Witness: Yes, sir.

The Court: And then who threw the rope to him?

The Witness: That I don't know, but there was a rope thrown across, where he grabbed with his hands, so he could keep out of the oil.

The Court: You were there, sir?

The Witness: Yes, sir. I will never forget it, your Honor.

[fol. 467] The Court: I don't doubt that you wouldn't forget it. But you are sure then that Russo's head actually went below the level of the oil?

The Witness: Yes, sir.

The Court: Then it was bobbing up and down out of the oil, is that right?

The Witness: That's right, sir.

The Court: All right.

By Mr. O'Neill:

Q. Now, Russo went down and you say he came up. Did he come up right near this ladder we have been talking about?

A. You mean when he came out?

Q. No, he went down this ladder?

A. Yes.

Q. And I am pointing now to the ladder on the starboard

side of the port tank, and that ladder goes right down to the bottom, does it, of the tank?

A. No, sir; it breaks at the next landing.

Q. And where was the oil with respect to that?

A. Well, it was below the next landing I should judge—maybe a foot, maybe two.

The Court: A foot or two below what?

The Witness: Below the level of that last landing.

The Court: Oh, the landing.

By Mr. O'Neill:

Q. When you talk about landing, do you mean these ledges that they have been talking about that go around that tank?

A. Yes.

Q. And where they finally got the basket on to get him out?

A. That's right.

Q. So that he went down—of course, when he went down [fol. 468] nobody knew how deep the oil was, did they?

A. That I couldn't say.

Q. When he went down this man was in that oil, and he went down to this ladder, and he let go and went down, and then he came right up again and grabbed the side, is that it? He grabbed the ladder?

A. Who is that?

Q. Russo.

A. No, when he got down he jumped right in feet first.

Q. Now, after he jumped in feet first, that was the first time anybody knew that there was eight feet of oil there, is that correct, as far as you knew, anyway?

The Court: Well, I don't know if it is fair to ask him to answer that.

Mr. O'Neill: All right.

The Court: Unless someone told him.

By Mr. O'Neill:

Q. Well, he came up then to the surface of the oil and what did he do then?

A. As he came up to the surface they threw the line and he grabbed it.

Q. Forget about the line. Mr. Russo went in the oil?

A. That's right.

Q. Then he came up. And what did he do when he came up that time, the first time he came up?

The Court: Did he say anything?

The Witness: No, sir.

The Court: What did he do?

The Witness: He kept looking for the body with his foot. And when he located it he brought it over with his foot as close to this bulkhead as possible. That would be down into the tank.

[fol. 469] By Mr. O'Neill:

Q. Now, at this time, after Russo got down there, the entire crew—not the entire crew but the people about there at the time, they were all around assisting, were they?

A. The Chief Mate and the Third Mate—or the Second, I don't recall which, but that gentleman that was here.

Q. And this rope that went down, that Mr. Russo used, that came from the First Mate, or somebody on the ship—I think you said you don't know; strike it out.

Now, in any event, there was a rope let down into the tank?

A. Yes, sir.

Q. And when that rope got there it was then that Mr. Russo was able to hold on to that rope——

A. That's right.

Q. —and go out by holding on to the rope, he was finally able to work this body over to the ladder, is that correct?

A. That's right.

Q. Now, to get the body out somebody had to go down under the surface of the oil?

A. That's right.

Q. Who did it?

A. That I can't remember, who went in.

Q. But some man there had to go—get down into that oil and get him up, and they had to have a rope, is that it?

A. Well, Mr. Russo was the only man in the tank.

Q. Well, you saw Russo when he came out. Was he covered with oil?

A. Head to foot.

Q. And then he came up and he went ashore, is that it?

A. After we got the body ashore.

Mr. O'Neill: That's all.

[fol. 470] The Court: Who lifted the body out of the bottom of the tank, do you know?

The Witness: No, sir.

The Court: You don't know?

The Witness: At that time I was hollering, "Ambulance—doctor; somebody fell over."

The Court: I have nothing further to ask Mr. Angrosina.

Recross examination.

By Mr. Cunningham:

Q. Did you proceed down the ladder after the accident with Mr. Russo and Mr. Donohue?

A. No, sir.

Q. Did you stay up on the main deck?

A. Yes, sir.

Q. And did you see all this from the main deck?

A. Yes, sir.

Q. And you saw Mr. Russo down in the tank, 22 feet below the shelter deck, from the main deck?

A. Yes, sir.

Q. Do you know which side of the tank this ladder was on that Mr. Russo went down?

A. Right here [indicating].

Q. The same side—you are pointing to the starboard side——

A. That's right.

Q. —of the port tank?

A. That's right.

Q. And you saw him go down that ladder and you were standing on the same side of the ship?

A. No, no. I didn't say I was standing at that time on the same side of the ship.

Q. Where were you standing then?

A. When that happened, they were working, I came

over here to this bulkhead and lowered this light that is in this corner down into the oil tank.

Q. Indicating that you came from the starboard side around to the after end of the No. 3 hatch?

A. That's right.

[fol. 471] Q. And you were standing at the after end when this happened, when Mr. Russo went down?

A. While he was in the tank.

Q. Yes. But when the accident happened you were on the starboard side?

A. Right here [indicating].

Q. And you are telling the Court, and you are telling me, that from this point on the after end of the hatch you could see down into the oil that was 22—more than 22 feet below the tank tops, is that what you are telling me?

A. Yes, sir.

The Court: Now, what kind of a light did you say you dropped in there?

The Witness: A cluster. They have a cluster here. Unhooked the wire, run over here, and dropped it down and held it there so they could see.

By Mr. Cunningham:

Q. And from that point on the main deck you saw Mr. Russo bobbing up and down in the oil?

A. Yes, sir.

Q. And the oil was more than 23 or 24 feet below the hatch coaming; do you know that?

A. No, sir; I don't know the measurements. I didn't say I knew the measurements.

Q. But you actually did see him coming up and down out of that oil?

A. Yes, sir.

Mr. Cunningham: I have no further questions.

Recross examination.

By Mr. George:

Q. When did you start to go for an ambulance?

A. After I hollered to them gentlemen.

Q. Yes.

A. They come in there and recovered the body. I hollered, "Get an ambulance."

Q. Well, tell us, was it before or after the body was brought on deck?

A. When the body was brought up.

[fol. 472] Q. After the body was brought on deck?

A. No, it wasn't brought on deck. It was in that tank.

Q. Still in the tank?

A. Yes, sir.

Q. And then what did you do?

A. I hollered on the dock, "Get a doctor; get an ambulance."

Q. And then what did you do after that, after you hollered?

A. That is all I could do.

Q. Then the police came later?

A. No, the police didn't come for a half hour. We had the body on the dock at that time.

Q. When they did did you tell them that you saw the accident?

A. They didn't ask me.

Q. I say, did you tell them?

A. No, sir.

Q. And notwithstanding the fact that you were, as you say, the only person there when the accident happened?

A. That's right. I didn't give a statement.

The Court: Nobody asked you so you told them nothing?

The Witness: That's right.

The Court: Didn't the cops ask, "Did anybody see this accident?"

The Witness: There was two detectives and two cops and they never asked.

The Court: They didn't ask anybody around there, "Did anybody see this accident?"

The Witness: Not to my knowledge. They never asked me. In fact, Mr. Russo and Mr. Donohue had gone up to the office to change their clothes, so I was looking for them to get their names.

[fol. 473] By Mr. George:

Q. But you were more or less a police officer yourself, weren't you?

A. No, sir; I am not a police officer.

Q. I mean, weren't you there for the purpose of doing police duty?

A. No, sir.

Q. A guard?

A. Yes, sir.

Q. And an accident occurred which involved a death and you gave no cooperation to the police who came there for the purpose of investigating?

A. I was not asked.

The Court: Don't answer that question. I have got my own idea about the cops who didn't even ask if anybody had seen this fatal accident. That's incredible to me. Everybody else beats it, worrying about their clothes, and a man has just died.

Mr. O'Neill: That isn't so. He said he didn't. There isn't any question that somebody here talked to the cops, but it wasn't this man.

The Court: All right. I can only go by what I heard so far.

All right. That is all?

Mr. O'Neill: That is all I have.

The Court: You're excused, sir.

[Witness excused.]

COLLOQUY

The Court: I know what you have in mind. It would seem the first one the cops would ask would be a man who is engaged in that kind of work.

Mr. George: Even if they didn't ask him, it was his duty to inform them, knowing that they came there for that purpose.

Mr. O'Neill: No, sir; I say this——

The Court: Now don't discuss the propriety or the [fol. 474] ethics of this situation.

Mr. O'Neill: I mean this, it is my experience that if there

isn't any suspicion about the death the cops are not particularly concerned.

The Court: They are not, if it is just an accidental death?

Mr. O'Neill: An accidental death, but no suspicion of foul play. Once they are convinced the man was just hurt in the course of his duties, they forget about it. We have a lot of these cases and that is the first thing we get.

The Court: I can understand that, too.

Mr. O'Neill: The police are primarily interested if there is any suspicion of foul play.

Mr. Cunningham: How do they find out that the man was hurt in the course of his duties unless they ask somebody?

Mr. O'Neill: You produce your witnesses.

Mr. Cunningham: I mean Mr. O'Neill is making an argument as to whether or not Mr. Angrosina would normally tell the police how an accident happened if they came on board or came on the pier.

The Court: Why do we clutter up the record with this? I am sorry I asked the question.

Mr. Cunningham: All right.

Mr. O'Neill: Your Honor, at this point I should like to read and submit Interrogatories, the Interrogatories and the answers thereto.

These are Interrogatories propounded by respondent, addressed to respondent-impleaded.

I don't know, sir, whether you want me to read these into [fol. 475] the record or not. Maybe I better and your Honor will have them in front of you.

"1. With reference to the shipment of approximately 480 long tons of Philippine Crude Cocoanut Oil in bulk discharged from M/V Tungus at Pier 3, Bayonne, New Jersey, on December 5, 1952, and December 6, 1952, state the following:

"(a) Who was the owner of the shipment on the dates of discharge?

"Pacific Vegetable Oil Company.

"For what purpose was this shipment discharged into

the possession of El Dorado Oil Works at its plant in Bayonne, New Jersey?

"Storage.

"At whose request did El Dorado Oil Works discharge the shipment?

"Davies, Turner & Company for Pacific Vegetable Oil Company.

"For whose account was El Dorado Oil Works discharging the shipment?

"Pacific Vegetable Oil Company.

"What was the relationship of Pacific Vegetable Oil Corporation to that shipment?

"Owner.

"What was the relationship of Davies, Turner & Company?

"Broker, on behalf of Pacific Vegetable Oil Company.

"When was El Dorado Oil Works first requested—"

Your Honor, may I have somebody else read this? My mouth is very dry.

[fol. 476] The Court: Sure. Let Mr. Watson read it.

Mr. Watson: "Interrogatory No. 2. When was El Dorado Oil Works first requested or ordered to discharge a shipment of approximately 480 long tons of Philippine Cocoanut Oil in bulk from the M/V Tungus upon the arrival of that vessel in the Port of New York in December 1952? From whom was the order or request received?

"Answer: El Dorado was probably informed by Davies, Turner & Company that the shipment of cocoanut oil was to arrive in New York.

"Interrogatory 5: Did any employees of El Dorado Oil Works attend aboard M/V Tungus during the surveying of the shipment of cocoanut oil in bulk?

"Answer: Yes.

"6. If so, what were the names of those employees and what were their capacities or positions on that date?

"Answer: Maintenance Mechanic O'Leary; Receiving and Shipping Foreman Sexton; and Helper Arthur Sampson.

"7. Did any employees of El Dorado Oil Works attend aboard M/V Tungus prior to the time that the El Dorado Oil Works pump and hoses were taken on board the vessel?

"Answer: Yes.

"8. If so, what were the names and positions of these employees?

"Answer: Receiving and Shipping Foreman Patrick J. Sexton.

"12. What was the name of the El Dorado Works employee on the scene in charge of the pump crew and/or the pumping operation at the time the pump and hoses [fol. 477] were taken on board the vessel?

"Answer: Patrick J. Sexton.

"15. Who directed the placing of the pump and the rigging of the hoses in the No. 3 upper 'tween deck of M/V Tungus on December 5, 1952?

"Answer: The Maintenance Department of the El Dorado Oil Works under Mr. O'Leary.

"21. What were the respective duties of the various members of the El Dorado Oil Works pump crew working on the discharging of bulk cocoanut oil from the port deep tank in No. 3 upper 'tween deck of the M/V Tungus on December 6, 1952, during the hours described in Interrogatory 19?"

And the hours described there are from midnight on December 6, 1952, through 0330 on the morning of December 6, 1952.

"Answer: Sexton was in charge of the pump crew. Russo and another man whose name the respondent-impleaded at the present time does not know composed the pump crew.

"22. Was one member of the pumping crew required to remain on duty in the No. 3 upper 'tween deck of M/V Tungus in order to maintain a constant watch on the pump itself on the morning of December 6, 1952, prior to the rupture of the discharge hose?

"Answer: Yes, but there was no rupture of a discharge hose to the knowledge of the respondent-impleaded.

"23. What was the name of the employee of El Dorado Oil Works in immediate charge of the electric pump of El Dorado Oil Works aboard M/V Tungus in No. 3 upper 'tween deck on the morning of December 6, 1952, during the [fol. 478] hours described in Interrogatory No. 19?

"Answer: Russo.

"25. Upon receiving the information referred to in Interrogatory No. 24 what employees of El Dorado Oil Works went back aboard M/V Tungus in order to correct the defect and/or stop the pump?

"Answer: Russo was informed of a leak in the pump and went aboard the M/V Tungus.

"34. At what time and by whom was the deceased, Carl E. Skovgaard, summoned from his home in order to report aboard M/V Tungus late on December 5, or early on December 6, 1952?

"Answer: About 12 midnight by Donohue.

"35. What were the usual working hours of the deceased, Carl E. Skovgaard, on December 5, 1952?

"Answer: Eight a.m. to 4:30 p.m.

"36. To what employee of El Dorado Oil Works did the deceased, Carl E. Skovgaard, report after being summoned from his home late in the evening of December 5, 1952, or in the early morning of December 6, 1952?

"Answer: The respondent-impleaded is not sure. Probably Donohue or Sexton.

"37. At what time did the deceased, Carl E. Skovgaard, report aboard M/V Tungus? What was the purpose of his attending aboard the vessel and under whom was he supposed to be working?

"Answer: About 12:30 a.m. To instruct other employees in the repair of the pump. He was a superintendent or supervisor.

[fol. 479] "41. What portions of the No. 3 upper 'tween deck of the M/V Tungus were affected by the liquid cocoanut oil spillage resulting from the rupture of the discharge hose in the early hours of December 6, 1952?

"Answer: The respondent-impleaded does not know."

Mr. Cunningham: Have you read all of those?

Mr. Watson: Have I read all 45? No, I have not. Forty-seven of them there were.

The Court: Do you have another witness now, Mr. O'Neill?

Mr. O'Neill: I would like to ask Mr. Blaney a few questions about the pump, if I may, sir.

The Court: Mr. Blaney, will you come back, please.

NORMAN W. BLANEY, recalled and testified further as follows:

Cross examination.

By Mr. O'Neill:

Q. This pump you were using, the part of that pump that failed, that was something that had been made up by El Dorado employees, had it?

A. I don't know.

Q. Do you know anything about that particular "T", or nipple, or whatever we may call it?

A. I know of it, yes.

Q. Well, you said, I think, that you took a look at this pump and found it in good condition, isn't that correct?

A. That is correct.

Q. Now, you recall making a statement to the underwriters that insured your company for damage to oil?

A. I don't recall it, no.

Q. Well, I show you this paper and ask you whether or not that is your signature?

A. That is my signature.

[fol. 480] Q. And you read this before you signed it, did you not?

A. Undoubtedly I did, yes.

Q. Well, isn't this in your writing?

A. It is not in my hand; my signature, yes.

Q. Isn't this your handwriting [indicating]?

A. Yes, it is.

Q. Now, do you remember making this statement: "The steam line was not an integral part of the pump——" Do you follow me here?

A. That's right.

Q. "It was made by us out of parts we had in stock in the form of an adapter," do you recall that?

A. That's right.

Q. You also said: "There was no relation between the injury to the employee and the steam line breaking down," do you recall that?

A. I don't recall saying it, but I must have, if it was taken down.

Q. And you said: "I learned that the nipple had broken as a result of normal vibration of the pump," do you recall that?

A. That is true.

Q. And there is no question that this complete discharging was under your man, Patrick Sexton, is that right?

A. There is no question.

Mr. Cunningham: Will you have that marked for identification, sir, that statement?

The Clerk: The statement will be marked R-9 for identification.

[Marked Exhibit R-9 for identification.]

Mr. O'Neill: That is all, Judge.

Mr. Baker: No questions.

Mr. Cunningham: Let me see the statement, please.

[fol. 481] [Document handed to counsel.]

The Court: You read it at your leisure, Mr. Cunningham. We will now adjourn for lunch. Return at 2 o'clock.

[Noon recess.]

Afternoon Session

Norman W. Blaney, resumed the stand.

Cross examination.

By Mr. Cunningham:

Q. Mr. Blaney, when you came back to the ship at about 2:30, or thereabouts, in the morning after the accident to

Mr. Skovgaard, did you make an inquiry as to how the accident occurred?

A. Yes, I did.

Q. And to whom did you speak; who told you how the accident occurred?

A. Russo and Donohue.

Q. And what did they tell you?

A. Well, they told me——

Mr. O'Neill: I object to that as not binding on me, what they may have told him.

Mr. Cunningham: Well, here is the purpose of this, your Honor. In cases where the testimony of a witness—a witness has been charged with making a recent fabrication it is permissible to have another witness testify that before——

The Court: Is this to affect the credibility of those two gentlemen?

Mr. Cunningham: Yes, sir.

The Court: If they told him one story and told another one here, it certainly is admissible.

By Mr. Cunningham.

Q. Well, what did they tell you?

A. They told me about the accident, how it occurred.

[fol. 482] Q. And will you tell me what they told you?

A. Well, Russo—I went upstairs to the office where Russo and Donohue were and I asked——

The Court: This office is on land?

The Witness: The office is on land, in part of the plant—main plant itself.

A. [continuing] —and I asked them what had happened, what events led up to it, and so forth. They explained that they had trouble with the pump, getting the suction, and Carl was called in, and Russo was down there switching the pump off and on, and Carl was directing him in orders, that is, relaying orders to him.

Carl came around and stepped up on to the beam and, bringing his other foot up, he slipped. Russo said he made a pass to grab him, and on his—the falling off of Carl

Skovgaard he grabbed at the bucket that was setting under the pump and he took the bucket down with him. . .

Q. Carl Skovgaard did?

A. Carl Skovgaard did.

Q. And did Mr. Donohue tell you about the same story?

A. He verified the same story, yes.

Mr. O'Neill: Well——

The Court: That is not binding on you.

Mr. O'Neill: I don't think it is in contradiction.

Cross examination.

By Mr. O'Neill:

Q. Did you make a record of this at that time, Mr. Blaney?

A. I did not.

Q. And after they told you this story, and you had talked to them to find out how it happened, you then made the statement that you read here this morning, that the breaking of the oil line had nothing to do with the injury to the employee, didn't you?

[fol. 483] A. The oil line had nothing to do with it, no.

Mr. O'Neill: I don't think it is admissible.

The Witness: I don't know whether I made myself clear or not——

Mr. O'Neill: If there was a jury, I would press my objection, your Honor, but——

The Court: Yes.

The Witness: I'm sorry.

The Court: What were you going to say?

The Witness: I don't know if I made myself clear.

The Court: Can you reconcile those statements?

The Witness: Yes. What I meant, the line itself having any injurious effect on the deceased, by that I mean flying or something like that. Is that what he meant?

The Court: Do you mean that the breaking of the line was, in your opinion, not the primary cause of the accident?

The Witness: That's right.

Mr. O'Neill: I didn't get that answer.

The Court: It is not the primary cause of the accident, he means. That is what he is trying to convey. Of course, we could start something about that, too.

By Mr. O'Neill:

Q. Well, as boss of the operation, as soon as you came down, or when it restarted again, the first thing you did was had the pump taken out of there and dropped down into the hole so they could get suction?

A. I did.

Q. So leaving the pump, or trying to pump with the pump where you had it originally—as soon as that pump lost suction the proper thing to do would have been to drop it [fol. 484] down into the tank, isn't that correct?

A. If you couldn't pick up suction readily, yes.

Q. And I think they testified here they were working from a quarter after 12 to 1:45 trying to get it started. Now, between that time this pump should have been taken off and dropped down into the hold, shouldn't it?

A. I am trying to think of the hours you said.

Q. 12:15 I think the time was that it is established by the written records that we first had trouble, and the time of death has been fixed by what written documents we have as 1:25, and between that time, as I understood the testimony of Mr. Donohue, and my witness here—my witnesses—they were trying to get the pump started, and one thing it didn't have was suction. I think that has been established.

A. Yes.

The Court: Now, had they dropped that line into the oil—further down, is that what you mean?

Mr. O'Neill: That's right, if they had followed the usual procedure and dropped the pump down to meet its capacity, that's what should have been done.

The Court: You are an engineer. Should that have been done?

The Witness: Yes, that should have been done.

The Court: It should have been done.

The Witness: After a reasonable length of time that they couldn't get the suction back.

The Court: And I take it from what you said then that both Russo and Donohue spoke as though they were there when this happened, is that right?

The Witness: That's right.

[fol. 485] The Court: And that Mr. Skovgaard was directing them while they were working around the pump?

The Witness: That is correct.

By Mr. O'Neill:

Q. And Mr. Donohue, did he have other duties besides working on this ship that night?

A. He had no specific duties other than working around —being around that ship.

Q. The only thing he was doing that night—he should have been on that ship all the time, is that it?

A. Not necessarily.

Mr. O'Neill: All right. Thank you, Mr. Blaney.

Mr. Cunningham: No further questions from the respondent-impleaded.

Redirect examination.

By Mr. Baker:

Q. In your work—and I understand you are a graduate of MIT—and from your experience, are you acquainted with the characteristics, and the effect, and the contents, and the nature of oils?

A. I am, through association with it, yes, with the oils.

Q. For instance, you can tell us about, say, the specific gravity of this type of oil?

A. I can, yes.

Q. Now, what effect would an immersion of a person in oil, repeated immersion of a person in oil, have upon that person?

A. Did you say repeated immersion?

Q. What effect would there be if a person went into that oil and bobbed up and down, what effect would that have —that oil and that temperature, as you have it?

The Court: Just a minute, please.

Mr. O'Neill: I don't see how that could possibly be admitted. This is probably the first time he ever heard of anybody being immersed in the oil. Now we are qualifying [fol. 486] him as an expert because he knows specific gravity.

Is it viscosity or specific gravity that would be concerned here, Mr. Blaney?

The Witness: Specific gravity.

Mr. O'Neill: What about the viscosity?

The Witness: The viscosity would be actually the flowability of the oil.

Mr. O'Neill: Isn't that important, too?

The Witness: Well, I believe we stated temperature in the—has been stated in the testimony here, which would show that the oil was in a very fluid state.

The Court: Can you answer that question, sir?

The Witness: About specific gravity, yes, I can.

The Court: With your education and training are you able to answer that question that Mr. Baker put to you?

The Witness: Yes, I am.

The Court: I will allow it.

By Mr. Baker:

Q. Would you answer it?

A. Yes, that if a body were dropped in the oil it would not bob, it would not bob up.

Q. What would happen?

A. It would immediately sink to the bottom.

Mr. O'Neill: That's true of any oil, if you fall into it?

The Witness: That's right.

Mr. O'Neill: You can't swim in oil, can you?

The Witness: That's right.

Mr. Baker: That's all.

The Court: Well, could a man do what it is claimed in this case that Mr. Bruno did and live through it?

[fol. 487] The Witness: Mister who?

The Court: Mr. Bruno.

The Witness: Russo?

The Court: Russo. Go up and down——

The Witness: No.

The Court: —in the oil?

The Witness: Not and have his head go under oil.

Mr. Cunningham: I didn't hear that.

The Court: Not have his head go under oil. That's what I am interested in.

Recross examination.

By Mr. O'Neill:

Q. Well, Mr. Blaney, Mr. Russo, if he went down, as has been testified to, from a ledge, down the way I am now, he would touch the bottom of that tank, wouldn't he? Do you know how deep the oil was?

A. It's been stated to be eight foot or thereabouts.

Q. When he would let go like that he would go down just like I am going now.

A. He certainly would.

Q. And he could spring up, couldn't he?

A. I doubt it very, very much.

Q. Well, how do you think they got the body out of the oil; somebody would have to go down under the oil, he would pull the body over with his foot, and then somebody had to go down and get it, wouldn't they?

A. I was not there at the time when the body was removed.

The Court: Well, do I understand your testimony to be then that a man could not immerse his head in that oil——

The Witness: And bob up.

The Court: —and bob up again?

[fol. 488] The Witness: No, he cannot.

By Mr. O'Neill:

Q. At an eight-foot depth, that is?

A. That is true.

Q. Has that ever been tried; have you ever seen it tried, have you had any experience along that line?

A. I have not seen it tried.

Mr. O'Neill: That is all.

The Court: There might be a good reason why nobody tries it, a very good reason.

Are you all through with Mr. Blaney?

By Mr. O'Neill:

Q. Are you sure there was eight feet of oil, Mr. Blaney?

A. I am not sure.

Q. If there wasn't eight feet of oil would your answer be any different?

A. No.

Q. It would be the same?

A. It would be the same.

Q. How high were these coils that were at the bottom of the tank?

A. That I could not say.

Q. It is your story that if a man just puts his head down so that the oil is up to here and he is standing on the bottom of the tank, it is impossible to spring up, is that it?

A. If the body were by itself, dropped into the oil, it would not rebound.

Q. Now we are talking about a man.

A. I am speaking of a man, too. I am sorry.

Q. All right. A man comes along and he gets, comes down this ladder, gets hold of the ledge and lets go, this way; you say once he did that, that is the end of him, that he couldn't spring back?

A. He would topple over, he wouldn't stay in a vertical position.

The Court: Why would he topple over?

[fol. 489] The Witness: Because there is no buoyancy to the oil, and the oil would just—the oil has an effect of getting in your ears, and in your nose, and so forth, of suffocation, and you just have no support. The oil does not support you. You just lie over—or fall over.

The Court: Yes, sir. Anything further?

Mr. Baker: That is all.

The Court: All right, Mr. Blaney, step down.

[Witness excused.]

SALVATORE RUSSO, recalled as a witness by the respondent, having been previously duly sworn, testified further as follows:

Direct examination.

By Mr. O'Neill:

Q. Mr. Russo, you went into the tank to get Mr. Skovgaard's body, is that correct?

A. That's right, sir.

Q. How did you do it?

A. Well, first when he fell in we immediately went down the ladder. After I got down there we come across—the ladder ended at——

The Court: You keep saying "we". Are you referring to yourself?

The Witness: No, me and Donohue.

The Court: Both of you?

The Witness: I went down first and Donohue followed me.

The Court: He followed you down.

The Witness: He followed me down the ladder.

A. [continuing] After we get down there—there is the ledge that goes along there.

Q. Well, so his Honor can follow that, let me show you [fol. 490] this photograph and ask you whether or not that represents the ladder leading into the tank?

A. This is it, right here [indicating].

Q. And these ledges you have been talking about are these?

A. Are down here, with the holes here [indicating]. Not this ledge, this ledge here [indicating]. The oil was, I'd say, about a foot below that.

The Court: A foot below that.

The Witness: A foot below this edge here [indicating].

Mr. Cunningham: I have no objection to this going into evidence. If you are going to mark it up or refer to it I think it should go into evidence.

Mr. O'Neill: I just want him to identify it.

Mr. Cunningham: He is saying "here" and "there".
Mr. Baker: Suppose you offer it.
Mr. O'Neill: All right.
The Clerk; R-10 in evidence.

[Received and marked Exhibit R-10.]

By Mr. O'Neill:

Q. Now, you came and you went down this ladder.
A. This ladder, right down to this edge here. After we got down there——
Q. Now, "we" again. Did you do it?
A. The both of us. I went down first and he followed me. Then there was just a little trickle of light down there, and he yelled for a light. And they immediately lowered a drop light down. Then when they lowered it I spotted air bubbles coming up in the center of the tank. Then I yelled to Ed, I says, "Ed, there he is. The bubbles are coming up."

[fol. 491] The Court: Ed is Donohue?
The Witness: Ed is Donohue. I will refer to him as Donohue.

A. [continuing] Then I lowered myself into the—down the ladder. And I got up to here and I couldn't feel bottom.

The Court: Indicating his neck.

A. [continuing] Up to my neck, up to my chin. I couldn't feel it. And as I went down I said, "The oil is hot."
So I couldn't feel bottom, because I felt if I could walk across—if I could walk across I could probably find him, walk out to him, but it was too deep.
Q. About how far out in the tank was this body when you found it?
A. I'd say not quite towards the center.
Q. About the center of the tank?
A. Well, I would say yes, near the center——
Q. Four or five feet out?
A. No, it was more than five feet. I'd say it was from here to that window there.

Mr. O'Neill: Can we agree that that is about 14 feet?
The Court: Yes, it is 14, 15 feet.

A. [continuing] It's about that, because he hit the center when I seen him hit. Then when I seen I couldn't get down far—rather, when I seen that it was too deep there, I let myself out.

Then Donohue yelled for a rope. When the rope came down, I tied one end to this ladder—tied one end to the ladder, and while he went around with the other end, he went around to the other side, and attached—and tied the rope on another beam there.

Then I lowered myself into the oil again, supporting on the rope, and waded out to where I seen the bubbles. And then I probed. In the meantime I was up to here [indicating].

[fol. 492] The Court: Up to his chin again.

A. [continuing] And I just held on and probed around till I spotted his arm.

By Mr. O'Neill:

Q. With your feet your (sic) probed?

A. Yes, with my feet. I did submerge once. Then after I got him I sort of pinched his jacket and I floated him right up. Once I got him moving the body just come up.

The Court: It did come up?

The Witness: Once I got him moving—once I got him moving, then he just come up, and then I grabbed him with my feet. But I never let go of the rope. And after I got him I floated him, I just kept edging back, and I floated him over to the ladder.

Then before they could grab him he dropped once more, but I caught him before he got down to the bottom with my foot, and I sort of put pressure on my arms, and with my legs just—I just sort of made him buoyant. After he was buoyant then they—I think Ed, or one member, grabbed him by the collar and they pulled him out.

The Court: So that at no time was your head immersed in the oil?

The Witness: No, sir.

The Court: At no time.

The Witness: No, sir; the oil was hot. When I first went in it was hot, it was really uncomfortable. But then I was determined to get the man out.

By Mr. O'Neill:

Q. But you had no difficulty in lifting this body, that we [fol. 493] have heard about, by simply catching your feet on his jacket?

A. Once I got my foot around the jacket—of his arm—then I just sort of gave a heave and he just come right up. And then I held him.

Q. Now, Mr. Russo, this is a statement we were talking about the other day. Have you refreshed your recollection as to whether or not you had read that statement?

A. Well, I read this the other day.

Q. Well, at the time you signed it.

A. Well, I didn't glance at the whole thing. I just—my mind wasn't clear. I mean—I gave a lot of statements out, your Honor.

Q. Now, how far did you go in school?

A. About two years of high school.

Q. And was this statement given to you to read by the man who wrote it?

A. Yes, it was. But I just glanced at it roughly because I was nervous.

Q. But this was two days after the accident.

A. This was two days. I was upset for about two weeks.

Q. I see.

A. I couldn't sleep.

Q. I see. Now, what is this here that I am pointing to?

A. Which is that?

Q. These two little letters here.

A. "S.R."

Q. Now, you crossed that out and initialed that, didn't you?

A. I guess I did.

Q. And up here? Well, I am just asking you now, did you initial it?

A. I did. That's my initial.

Q. And on this statement you talk—you say here that "the oil that had leaked out due to the broken pipe was on the forward end of the tank top and on the shelter top forward of the tank coaming."

[fol. 494] A. The oil that leaked from where?

Q. Leaked out due to the broken pipe.

A. Let's see.

[Document handed to the witness.]

Q. Well, that is what it says there, isn't it?

A. Yes. Well, I just want to look at it.

Q. I will ask you the questions about the rest.

A. All right.

Q. Then you said, "He put one foot on the cover when he slipped and fell."

A. That's right.

Q. You continue, "The oil that came out of the pump during repairs I wiped up with rags."

A. I wiped up the fittings around the pump. I didn't wipe up the oil. I couldn't have made such a statement, because there was oil all over the place.

Q. Well, you didn't know about this statement the other day when you first testified to that, did you?

A. Well, no, I denied making that statement.

Q. I know you did. And you say, "It is possible there might have been a slight oil slick on the tank cover at this point but no oil from the original leak had spread over the point."

A. No, sir; I couldn't have made that.

Q. "Any oil in this section would be what leaked out of the pump and not due to the oil spill."

A. No, sir; I couldn't have made that statement.

Q. Well, before anything happened there was enough of a leak from the pump to send you ashore to get rags, wasn't there?

A. It isn't what I went ashore for. I went ashore to get a few rags that I needed to wipe off grease around the fittings and to keep my hands clean.

Q. Well, let me read you this, and you initialed this, [fol. 495] "The oil in working space on the tank top was squeegeed around the pump," is that correct?

A. Let me see that, please, sir.

[Document handed to the witness.]

A. [continuing] That's why we were repairing it. We just pushed the oil aside.

Q. —that had you prepared this spot properly this man might not have been hurt.

A. Pardon? Can I have that question again?

Q. I just asked you this. Was there any feeling—or is there any feeling now that if you cleaned up the work space properly there wouldn't have been any accident?

Mr. Baker: I object. That is a conclusion for the Court.

The Court: Sometimes the difference between conclusion and fact is very hard to define, isn't it? Usually when we recite a fact we conclude something and we say, "This is the fact."

Mr. Baker: But he is not asking for facts, he is asking for feelings and thoughts. That has nothing to do with it. We are interested in evidence and facts, not in feelings and thoughts.

The Court: Then we could go into how he cleaned it; was there any oil left there at all; how much oil was left? Then you would start speculating.

Mr. Baker: But he is asking about his feelings.

The Court: What do you mean, what his feelings were?

Mr. O'Neill: Well, all right.

By Mr. O'Neill:

Q. It was your job—or you understood the job of cleaning the space where you were going to work and where you [fol. 496] thought anybody working on that pump would work, is that correct?

A. You mean as far as cleaning up the spill?

Q. Cleaning up the working space.

A. Is that before the accident or after the accident?

Q. Well, you say here you squeegeed the oil. What do you mean by that?

A. The immediate area, where we were putting the fitting on, we pushed it aside.

Q. That's right, in the place where you were going to

work, or you thought anybody who would come down to work on that pump, was cleaned by you, before the accident?

Mr. Baker: I object.

The Court: Well, that would presuppose that he would anticipate that sooner or later somebody was going to call Carl Skovgaard to come down.

Mr. O'Neill: I will straighten it out.

Q. Hadn't Carl Skovgaard been called to come down before we had this big leak?

A. I didn't know if he was informed or not. I just seen him. It wasn't my job to call him up.

Q. As a matter of fact, you heard today he was called before 12 o'clock, didn't you?

A. He was. Yes, I heard it in the testimony.

Q. And you were working under Mr. Donohue, is that it?

A. That's right—no, under Mr. Sexton.

Q. What was Mr. Donohue's job?

A. Go around, I guess—go around, checking.

Q. Well, you were here when Mr. Donohue testified that he squeegeed a spot around where you were going to work on the pump, weren't you?

A. I don't recall that.

Mr. Baker: I object to the characterization of the wit- [fol. 497] ness' testimony.

Mr. O'Neill: All right.

The Court: Maybe they both did. Are you sure you squeegeed a little bit?

The Witness: We both—we pushed it aside.

The Court: You both did?

The Witness: We both—we just pushed it aside so we won't slip all over the place.

By Mr. O'Neill:

Q. How big is the pump?

A. Oh, I don't know. I haven't seen one in three years. Maybe about four feet.

Q. That's long.

A. Well, I am not sure of the exact measurements. Maybe more, maybe five, four and a half, something like that.

Q. And to work on these fittings you have been talking about you would have to clean on each side of the pump, would you not?

A. Just around where the fitting broke.

Q. In other words, you would go down—how big a spot did you squeegee?

A. Oh, I couldn't say. I mean I don't remember. Just pushed some oil aside, just so we could have standing room.

Q. Well, you needed kneeling room, too, didn't you?

A. It's possible.

Q. Well, you testified the other day, did you not, that when Skovgaard came down the ladder he came down behind you, you were kneeling at the pump.

A. No, he didn't come down behind me. He came down at the side of me, because I was facing forward.

Q. All right, it is in the testimony. When did you first discuss this theory of the body immersed in oil; was that at lunch today?

[fol. 498] A. At lunch? You mean since the accident?

Q. No, today.

A. After I heard the witness—Mr. Angrosina's testimony. I mean it was contrary to what I said.

I will swear before almighty God that what I say is the truth, your Honor.

Mr. Cunningham: Can I hear the question, your Honor? Either the question is different than I heard or the answer isn't responsive.

[Record read.]

Mr. Cunningham: That's what I thought. I can't object to the question now because he already answered, but I think the answer is not responsive.

By Mr. O'Neill:

Q. Now, this light that you talk about going down in the tank, that was dropped from the upper deck down to you people down below?

A. That's right, the cluster light.

Q. And if you stand at any coaming there—this is Libelant's 9—as these men are standing, you look right down into the deep tanks, don't you?

A. That's right.

Q. And anybody standing here, and you down there, with the light, looking down that way, would have nothing to obstruct their view, would they?

A. No.

Mr. Baker: Standing where?

The Court: Maybe we better put where "here" is.

Mr. O'Neill: Where the people are.

Mr. Baker: Where is that? You are pointing to L-9, top deck.

The Court: Overlooking the——

The Witness: I don't remember where the light was.

[fol. 499] The Court: —the port tank.

By Mr. O'Neill:

Q. I didn't ask you that. I said standing here and looking down—the edge of this tank is about even with this one, so you look right down into the tank?

A. Yes, sir; you can see there.

Q. And with this light that you had down there, there wouldn't be any difficulty for a man standing up there to look down and see what you were doing.

A. You mean after the light was dropped?

Q. Yes.

A. Then we had light, after it was dropped.

Q. And he could see what you were doing?

A. Yes, after the light was dropped, after the light was dropped.

The Court: Before the light was dropped it was dark in that tank.

The Witness: No, not completely dark. I seen the deceased fall, clear; I seen him clearly fall.

The Court: In other words, there was some light in there?

The Witness: There was some light.

The Court: Once they dropped the cluster then you could see very well.

The Witness: Then we could see really well.

Mr. O'Neill: Well, your Honor, maybe we better clear up that last Exhibit. What is it, 10? I think we talked there about this, that and the other thing without marking it.

By Mr. O'Neill:

Q. Now, will you mark the ladder—let's do it this way. This is starboard.

A. Starboard. [Witness marks photograph.]

Q. This is aft.

A. [Witness marks photograph.]

Q. Port.

A. [Witness marks photograph.]

[fol. 500] Q. Forward.

A. [Witness marks photograph.]

Q. Now, would you point on this Exhibit to the ladder you went down?

A. Right here. [Indicating].

The Court: Put an arrow there, going down. That's right.

[Witness marks photograph.]

By Mr. O'Neill:

Q. Then you reached—I think you called it a ledge, down on the bottom.

A. Right down here. Shall I put an "X" or an arrow?

The Court: Put an "X". That's the ledge.

Q. Eventually, when you went down into the oil, you went down from this point that is marked with an "X", is that correct?

A. Right here.

Q. Now, did your feet touch bottom at all?

A. No, sir. That is why I came up again, because my feet didn't touch bottom.

Q. When you went out on the rope did your feet touch bottom?

A. Not until I got to where the deceased was.

Q. There wasn't any slack in this rope at all—how high above your head was the rope?

A. I'd say about this high [indicating], about this high. And the oil was up to here on me [indicating].

The Court: What is that about?

The Witness: About this high. I know my arms were outstretched.

The Court: About a foot, foot and a half?

Mr. O'Neill: About 20 inches, I'd say.

The Witness: I know my arms were outstretched. I was [fol. 501] just keeping myself above oil. I mean, if I couldn't feel him then I couldn't do anything about it, then I would have to come out. But it just so happens at that point I was able to grab him and float him out.

By Mr. O'Neill:

Q. And didn't you have to slacken off a bit on the rope, or go down a little bit, to get your feet on him?

A. No, sir; the rope was never touched once it was set in place.

Q. When you were like this you pointed out to the Court here that you were just about as high as you could reach at that time and keep your head above water, is that correct?

A. I was up to here [indicating], and I just felt his arm.

Q. Then you got out here and you put your feet down——

A. That's when I got to the center of the tank.

Q. —and all the way from the center of the tank, hand over hand, you were able to feel—keep this body that was covered with oil over to the side, is that correct?

A. That's right.

The Court: And you lifted it out with your feet?

The Witness: I put pressure on the rope, as though I was hanging, and once I pinched his arm, his sweater, or whatever I caught, his arm, I just floated him right up, by putting pressure, and held tight with my feet, I just floated him—I got the body in motion.

The Court: And it came up?

The Witness: And it came up, by forcing him. Once I

got him up there, then I held onto him, tight. I don't know what gave me the strength.

The Court: It did come up?

The Witness: It did come up, when I forced the body up [fol. 502] by pressure, by one pull, it came right up.

Mr. O'Neill: I have nothing further.

The Witness: But he was laying on top of the steam coils.

The Court: He was laying on top of the steam coils?

The Witness: That's where he landed, right on top of the steam coils.

Mr. Baker: No questions.

Cross examination.

By Mr. Cunningham:

Q. Mr. Russo, when did you arrive at the El Dorado pier the evening of December 5, 1952?

A. About 11, five minutes to 11.

Q. And did you have lunch on the Tungus—Tungus is the name of the ship.

A. The Tungus.

Q. Did you have lunch on the ship?

A. No, sir.

Q. Did you have lunch with Mr. Angrosina on the ship at 12:30, or thereabouts?

A. I have never seen Mr. Angrosina until I seen him in this courtroom.

Q. Answer my question directly. Did you have lunch with him?

A. No, sir.

Q. What time do you usually have lunch when you arrive on board ship at 11 o'clock, what is your usual lunch hour?

A. Well, an eight-hour day, I wait till the four-hour period is over, that would make it mid-day, then I'd have lunch.

Q. You mean that would be about three or four in the morning, sometime? Is that the usual time?

A. About three, 3:30.

Q. Now, did you hear Mr. Angrosina testify here con-

cerning the fact that he was alone at the time of this accident and that no one else saw the accident; did you hear that testimony?

[fol. 503] A. Yes, I heard the testimony.

Q. Now, did you actually see Mr. Skovgaard fall?

A. Yes, sir.

Q. Was Mr. Angrosina there?

A. No, sir; not that I can recall. The only ones that were there were me and Edward Donohue.

Q. Were you off the ship to get a wrench of some kind and was your attention attracted by a whistle?

A. No, sir.

Mr. Cunningham: All right.

Redirect examination.

By Mr. O'Neill:

Q. You did have to get wrenches for the work you were going to do, I think you told us the other day?

A. We had wrenches on hand.

The Court: You had the wrenches there?

The Witness: We had wrenches on hand, in that bucket. We always kept the tools in the bucket.

By Mr. O'Neill:

Q. How many buckets did you have?

A. There was one for tools and one for the drip.

Q. Did you bring the bucket of tools aboard?

A. No, sir; they were there when I got there.

Q. But they were just the spanner wrenches, weren't they?

A. They were crescent wrenches.

Q. When you talk about a crescent wrench you mean that you put around a——

A. It is adjustable. They call it a crescent wrench.

Q. And how did you get these hoses off?

A. Well, there is a bolt that goes through the flanges. You connect the flanges with bolts.

[fol. 504] Q. Didn't you tell us the other day you had a spanner wrench?

A. No, sir; I didn't mention a spanner wrench.

The Court: He said a crescent wrench.

By the way, are you sure that you didn't see Mr. Angrosina there that night at all?

The Witness: Well, I don't recall him.

The Court: You don't remember seeing him?

The Witness: I never met him before.

The Court: You recall no whistle blowing after the accident?

The Witness: No, sir.

The Court: No cry for help, or getting an ambulance, or to get a doctor?

The Witness: Well, there might have been, because I was down in the tank.

The Court: But you didn't hear it?

The Witness: No, sir.

The Court: You have no recollection of hearing it?

The Witness: No, sir.

The Court: Did you ever see Angrosina before in your life, before today?

The Witness: No, sir; I don't recall.

Recross examination.

By Mr. Cunningham:

Q. Where did you go to change your clothing after you had been down in the oil getting the body out of the tank?

A. Well, after I came out from getting him out, immediately after he was put on that edge, I climbed out of the tank, because I was exhausted. I mean——

Q. Where did you change your clothes?

[fol. 505] A. Oh, in one of the Mate's—it was on board ship.

Q. Did you hear Mr. Angrosina testify that you went ashore and changed your clothing ashore?

A. Yes, sir; I heard that testimony.

Q. Did you actually go ashore to change your clothing?

A. No, sir.

Redirect examination.

By Mr. O'Neill:

Q. Your clothes were covered with oil?
A. Pardon?
Q. Your clothes were covered with oil?
A. Yes, sir.

Cross examination.

By Mr. Baker:

Q. When did you have lunch that night?
A. I didn't have lunch.
Q. You didn't have lunch?
A. No, sir.
Q. And you didn't have lunch with Mr. Angrosina, as he testified, you and Donohue?
A. No, sir; I wouldn't eat a half hour after I come on the job, even an hour I wouldn't eat.

Redirect examination.

By Mr. O'Neill:

Q. You came on at 11 o'clock, didn't you?
A. Eleven, five to 11, something like that.

Mr. O'Neill: That is all.
The Court: Is that all of him? All right, Mr. Russo, step down.

[Witness excused.]

Mr. O'Neill: I will rest.
The Court: The respondent rests.

The Respondent Rested.

Mr. Cunningham: The respondent-impleaded reserves to itself the right to make a motion to dismiss the impleaded petition at the end of my case in accordance with [fol. 506] admiralty practice.
I will call Mr. Wagner as my first witness.

JOHN ANTHONY WAGNER, called and sworn for the respondent-impleaded, testified as follows:

The Clerk: May we have your name, sir?
The Witness: John Anthony Wagner.
The Clerk: And your address, for the record.
The Witness: 208 Avenue E, Bayonne, New Jersey.

Direct examination.

By Mr. Cunningham:

Q. Mr. Wagner, by whom are you employed at the present time?

A. Standard Packaging Company.

Q. Keep your voice up and speak slowly enough so that this man can get what you say.

A. Standard Packaging Company.

Q. When were you employed by the El Dorado Oil Works?

A. From February 5, 1950, till August 13 of 1953.

Q. On December 5, 1952, what was your job at El Dorado?

A. Maintenance machinist.

Q. Do you recall now whether or not you did any work on a pump during the day of December 5, 1952?

A. I do.

Q. Do you know whether the pump on which you worked was the pump which was used to discharge oil on the M/V Tungus?

A. Yes, sir.

Q. Well, now, if you can recall what you did, will you tell his Honor what you did to inspect and repair that pump, if any repairs were necessary?

A. I received—that morning I received orders from my supervisor, Mr. Skovgaard, to repair the pump, check it, because the ship is coming in later that day. I went down to where it was, in the mill building below the machine shop, and I went through my routine inspection, re-aligned [fol. 507] the gears, and I told Carl what else I can do.

He told me it would be a good idea to go ahead. I put four pins in the legs of the pump to secure it to the base so she don't shift on us. I also put new packing in, in the glands, and new fins inside the pump.

Q. New what?

A. Fins, blades that bring up the oil.

Q. After you were finished with this inspection and repair of the pump, what did you do?

A. I called it to the attention of Mr. Skovgaard. We both went over it. We turned it by hand to make sure it is workable, and everything, and we were both satisfied that she was in good working condition.

Q. And then what happened?

A. Just then someone called me to go check another pump, behind another building, which I went there, and like a fool, I put on the switch and I burned myself—hot water come shooting out of the pump and I got it all over me.

Q. This second pump that you talk about has nothing to do with this case?

A. No, that is two different pumps.

Q. But when you and Carl Skovgaard were finished inspecting the pump, and you were both convinced that it was working properly——

A. Yes, sir.

Q. —what did you do with it then, did you put it on the pier to await the arrival of the ship?

A. Yes. They took it on what they call a stringpiece, or something, on the side of the pier and put it there.

Q. And then you went home?

A. I went home around 4:30, yes.

Q. And you weren't on the scene of the accident when Mr. Skovgaard——

A. No, sir.

Q. You didn't come back till the next morning?

[fol. 508] A. No, I didn't come back till Monday morning.

Mr. Cunningham: All right. No further questions.

Cross examination.

By Mr. O'Neill:

Q. This packing that you put in, before the pump would stop leaking that packing would have to be soaked up, wouldn't it?

A. That was another packing, sir. We did put graphite on it.

Q. Even if it is leather, or oakum or——

A. No, you put graphite on there, and grease.

Q. So it was to be expected when that pump went aboard that there would be some leaking until she tightened up, wasn't it?

A. No, you adjust it as you start to pump.

Q. Did you test it to see if it was leaking?

A. I had no way of testing it, sir.

Q. Did you have anything to do with making this piece that wasn't a part of the pump that was used in this operation?

A. No, sir; that is not a maintenance job—not a machinist's job.

Q. No, not the emergency. Did you say emergency?

A. No, I said that wasn't a machinist's job, that piece. Are you talking about that nipple?

Q. Yes.

A. No, I had nothing to do with that.

Q. You had nothing to do with the testing of that?

A. No, sir.

Q. Your job was to see that the pump worked?

A. Was in working condition, yes.

Mr. O'Neill: I have nothing further.

Mr. Baker: No questions.

Mr. Cunningham: Thank you, Mr. Wagner.

[Witness excused.]

JOHN J. O'LEARY, called and sworn for the respondent-[fol. 509] impleaded, testified as follows:

The Clerk: May we have your name, please, sir?

The Witness: John J. O'Leary.

The Clerk: And your address, for the record?
The Witness: 812 Avenue C, Bayonne.

Direct examination.

By Mr. Cunningham:

Q. Now, Mr. O'Leary, will you kindly keep your voice up so we can all hear you.

Will you tell us where you are employed now?

A. At the El Dorado Oil Company.

Q. How long have you been working there?

A. Approximately five and a half years.

Q. On December 5, 1952, what was your job at El Dorado?

A. I was a maintenance mechanic.

Q. Was your job similar to that of Wagner, who just testified?

A. No, Mr. Wagner was more of an inside machinist and I was an outside one.

Q. When did you come to work on December 5?

A. At 8 o'clock in the morning.

Q. And how long did you work that day?

A. Until nine—punched out at 9 o'clock that night.

Q. Were you on the pier when the M/V Tungus tied up?

A. Yes.

Q. Was the pump on the pier at that time?

A. Yes, sir.

Q. And what was your job with regard to the pumping of the oil out of the M/V Tungus?

A. My job was to put the pump aboard the ship, and to start the pump, and to see that it was in working condition.

[fol. 510] Q. Did you go aboard the M/V Tungus when she came in?

A. Yes.

Q. Were you on the ship when the tank lids—and I refer now to Libelant's Exhibit 9—the tank lid, port tank lid, was moved, were you on board when that happened?

A. Yes.

Q. Would you describe that operation for us, please, telling us who did it and how it was done?

A. Well, after we got our gear on the pier I went aboard the ship to tell them where to place the pump. In the meantime the crew were taking the cover off with the winches and turning it to this particular angle that is shown here.

Q. Now you are referring to Libelant's Exhibit 9 and when you say "this particular angle" you are referring to the tank lid on the port side?

A. That's right.

Q. Marked "port" on the photograph?

A. That's right.

Q. Now, who was directing the winch operator?

A. The ship's crew.

Mr. O'Neill: Not the crew——

The Witness: Well, the Mate.

Mr. O'Neill: Can we boil that down to somebody?

Mr. Cunningham: I think it is the Third Mate.

The Court: He said the Mate.

By Mr. Cunningham:

Q. The Mate, did you say?

A. Yes, sir.

Q. And where was he standing when he was directing this operation?

A. He was up on the top, on the main deck.

Q. You are again referring to Libelant's Exhibit 9 and you point to the port side of the main deck?

A. That's right.

Q. And how was he signaling the operators of the winch?

A. He was hand-signaling them.

[fol. 511] Q. And was he giving any signals to the persons who were manipulating the tank lid?

A. Yes, he was directing how it should be placed.

Q. And after the tank lid was placed, was it placed in about that position, or was it any different?

A. Approximately that position.

Q. And then what did you do, sir?

A. And then they swung the boom over the side to lift our pump aboard.

Q. Who did that?

A. The ship's crew.

Q. And then the pump was taken aboard?

A. That's right, sir.

Q. And did you direct the placing of the pump?

A. No, they put the pump down, and I just wanted to make sure that the suction side was towards the open hole.

Q. And you told them how to put it so that the suction side would be——

A. I told them to put the suction side——

Q. Wait till I finish the question so that the reporter is not confused.

And you waited until they put it down and told them how it should be put down, so that the suction side would be at the open hole?

A. Yes, sir.

Q. Then what did you do?

A. Well, then I had my hoses to get aboard the ship.

Q. And did you do that?

A. Yes.

Q. How was that done?

A. Well, approximately the same way.

Q. You mean the ship's boom takes the hoses over on the ship?

A. From the dock to the ship.

Q. And then did you hook up the hoses to the pump?

[fol. 512] A. Yes.

Q. Who was with you, if anybody?

A. Well, offhand I don't recall, but I had a helper. Who he was, at this time I can't remember.

Q. Well, did you start the pump?

A. I did.

Q. Will you tell us, please, what you did, or how you hooked it up; and if you started it, how you started it, and how it acted, how it worked?

A. Well, when I got all of my suction and discharge hoses, and my air connections tied in we had to go aboard —had to go back on the dock to actually throw the electrical connection from the dock to the switch on the pump, which I did, came back aboard the ship, down this ladder to the pump and——

Q. Wait. When you say "this ladder" you are referring to Libelant's Exhibit 9 and the ladder on the port side?

A. That's right.

Q. All right. And you came down the port ladder?

A. That's right.

Q. What did you do then?

A. And then I started the pump.

Q. Now, did you make any tests?

A. Well, took a few minutes to pick it up—in other words, it was a dry line—took a few minutes to get the oil—oh, I'd say a minute to get suction. Then we got the suction up, checked the packing gland, which we had the small cans under, and backed the packing out a little bit so it would drip.

Q. You did that yourself?

A. That's right.

Q. And how long did you stay with the pump?

A. Well, I was there until approximately 8:30 or 20 minutes to nine.

[fol. 513] Q. And during that time tell us how the pump was working?

A. The pump was working in a very satisfactory condition.

Q. Was there a drip from the gland?

A. Yes, small drip, which I purposely had so it would lubricate.

Q. And was that caught in a bucket?

A. Yes, we had a small bucket and a can, one on each end.

Q. You say you were there until 8:30 with the pump?

A. Or 20 minutes to nine.

Mr. Cunningham: All right. No further questions.

Cross examination.

By Mr. O'Neill:

Q. Who were you working under?

A. I was working directly for Mr. Skovgaard.

Q. Well, Mr. Skovgaard wasn't there at 8 o'clock, was he?

A. No. Well, at 8 o'clock, when I started putting that stuff aboard, it was much before 8 o'clock. I don't know the exact time.

Q. What time did Mr. Skovgaard leave?

A. I have no idea.

The Court: What time did he leave?

Mr. O'Neill: Mr. Skovgaard. He said he was working directly under Mr. Skovgaard.

The Court: Was Mr. Skovgaard on board the ship while you were putting the pump on and all that?

The Witness: No.

Mr. O'Neill: I was coming to that. I was surprised, too.

By Mr. O'Neill:

Q. When you went aboard this ship you were in charge, so far as the mechanics are concerned, is that it?

A. No, there was only myself and the helper.

[fol. 514] Q. Who was your boss at that time?

A. Mr. Skovgaard.

Q. Was there anybody on the ship telling you what to do?

A. No.

Q. That is, anybody from El Dorado?

A. No.

Q. That was left to you?

A. That's right.

Q. So that you were in complete charge of the operation?

A. I was assigned to that job.

Q. And when you went aboard you were in complete charge?

A. That's right.

Q. Now, when a ship comes in like that it is customary for the ship to supply winchmen, is that it?

A. True.

Q. And you say in this case they also supplied men down in the hold of the ship?

A. Yes, sir.

Q. How many?

A. In the hold I believe there was two.

Q. Now, these two men, did they speak English?

A. Yes, practically all of them spoke English.

Q. Let's stick to the two men that were down in the hold. Did they speak English?

A. Yes.

Q. Did you have any conversation with them?

A. No.

The Court: I didn't hear any answer. Will you raise your voice, please?

A. No.

Mr. Cunningham: I didn't hear the answer.

The Court: No, the answer was.

By Mr. O'Neill:

Q. Now, you were down there for the express purpose of arranging for a firm foundation for this pump, is that correct?

A. That's correct.

[fol. 515] Q. And where did you intend to place it?

A. I intended to place it right where they put it.

Q. So that the fact that anybody from the ship placed the lid in that position, that satisfied you all right, did it?

A. That satisfied me, yes.

Q. Now, then, you ordered the pump over; was that the next move?

A. That's right.

Q. And you ordered the pump placed on that lid?

A. Well, they dropped it on the lid and I ordered the particular side, the suction side, to face the hole.

Q. And they placed that to your satisfaction?

A. Yes, the suction side.

Q. And so that at the time that you ordered the hoses aboard the ship everything in that hold was just the way you wanted it before you started pumping, is that correct?

A. Yes.

Q. Now, then you brought these hoses up?

A. That's right.

Q. Did the crew have anything more to do other than to bring the hoses on, the crew of the ship?

A. They did hold the suction hose while I got the bolts on, because it was too heavy for me to handle.

Q. Did you have an assistant with you at that time?

A. Yes.

Q. Who?

A. I don't know his name. He was a mechanic's helper.

Q. So it took four men to do it?

A. No, he and I worked on the hose while the ship's boom held the hose up for us.

Q. But the crew didn't actually have to handle the hose itself, they held it suspended——

A. That's right.

[fol. 516] Q. —on a runner to the boom?

A. That's right.

Q. Then you just pulled it over——

A. I just pulled it to the bolts and bolted it up.

Q. Now, on this discharge line, you had on that—it has been variously described as a "T" and a nipple; where did that come from?

A. That come from the shore, too.

Q. Did you have anything to do with making that?

A. No.

Q. That was something that was made by the El Dorado people?

A. Yes, I believe so.

Q. Had you tested that before?

A. Oh, I have pumped quite a few ships with that same arrangement.

Q. Well, this particular piece of equipment that failed this night, had you used that before?

A. Yes, we had used it before.

Q. And that had connected to it a steam or an air line?

A. Yes, air line.

Q. And you arranged for the direction in which they were to go ashore, is that it, how they were to go up over the side?

A. It is only a one-inch line.

Q. That's the steam line?

A. That's right.

Q. But your discharge line was about four inches?

A. Well, in diameter—is a very heavy hose—approximately seven or eight inches in diameter.

The Court: Will you please keep your voice up?

A. [continuing] The outside of the hose was approximately seven or eight inches in diameter.

Q. And what is the inside of the hose?

A. Probably four or five.

[fol. 517] Q. And you connected that up with somebody whose name you don't recall?

A. That's right, I had a helper.

Q. Did you sign the helper's slips?

A. No.

Q. Do you know whether he stayed after you had left, did he stay aboard the ship after you left?

A. That I couldn't say.

Q. Well, you stayed there until this pump got started, is that it?

A. That's right, I started it.

Q. And did you tell anybody what you had done, from El Dorado, or where you had placed the pump?

A. What was that? Repeat the question.

Q. You placed this pump, you started it. Now, before you left did you tell anybody how you had placed the pump?

A. No.

Q. In other words, the placing of the pump was entirely up to you?

A. That's right.

Q. Mr. Sexton had nothing to do with it; you did that?

A. Mr. Sexton was in charge of the pier, but——

Q. And then you walked off and you left—do you know who you left in charge of the pump?

A. I believe Mr. Sampson came.

Q. And is it his job to stay down there?

A. Well, to the best of my recollection he is supposed to watch the pump and the flexible hoses leading out of the hole.

Q. Did you give him orders to stay down there at all times?

A. No.

Q. In other words, it is customary at the plant if a man wants to go ashore, it is up to him, is that it?

A. No, I wouldn't say that. He would have to come out of the hole to check the pipe, and from over the side of the ship onto the pier, and see if there is a leak there, too.

[fol. 518] Q. I see. So sometimes he is off on the shore checking to see whether or not those pipes are leaking?

A. No, he can see it from the ship's side. You don't have to go ashore to see it.

Q. Now, what is your knowledge of the pump, by that I mean its capacity, have you any knowledge of it?

A. Yes, the pump is rated 90 ton an hour.

Q. And is that for all oils—do you have other oils besides cocoanut oil?

A. We have pumped other oils with it.

Q. When you say 90 tons an hour, what does that mean, any type of oil?

A. No, sir.

Q. Just cocoanut oil?

A. With cocoanut oil it was rated 90 ton. When we went into heavier oils, why, it didn't do that.

Q. And how far would the pump suck?

A. We have sucked——

Q. Let me ask you this. A pump pushes further than it sucks, doesn't it?

A. What?

Q. A pump will push—this is a centrifugal pump, isn't it?

A. That's true.

Q. And it will push further than it will suck, isn't that so?

A. That's true.

Mr. Cunningham: I didn't hear your answer.

A. That's true.

The Court: Does that mean that it pushes the oil up the pipe?

The Witness: Yes.

The Court: Pushes it up.

The Witness: Our tanks are approximately 200 feet from the boat, so it actually pushed it into the top—the tanks are 35 feet high—200 feet away plus 35 feet in the air.

[fol. 519] By Mr. O'Neill:

Q. Once you got oil through the centrifugal part——
A. The head pressure was plenty to deliver it to the tank.
Q. Now, did you measure this tank?
A. No.
Q. You didn't know at the time you were on there the distance from the tank lid to the bottom of the tank?
A. No, sir.
Q. And was it your thought that the man who relieved you would have to lower that pump to finish the job?

Mr. Cunningham: I object to what his thought was. That would depend on what happened after he left the ship. I think that is immaterial.

By Mr. O'Neill:

Q. Well, at the time you placed the pump there you didn't know how much the pump would suck, did you?
A. No.

Mr. Cunningham: No redirect.

Cross examination.

By Mr. Baker:

Q. After that pump was placed—I think you said it was before 9 o'clock that night——
A. Oh, yes.
Q. —did you leave the ship?
A. What?
Q. Did you leave the ship?
A. Yes. My job was just to put the pump aboard and get it running and then leave. I was on overtime.
Q. And did you return to the ship after that?
A. Yes, I was called back.
Q. When?

A. At 3 o'clock in the morning.
Q. Three o'clock the following morning?
A. Yes.
Q. And that was after——
A. After the accident.
Q. —Mr. Skovgaard had the accident?
A. After the accident, that's right.
[fol. 520] Q. And did you go to the deck where this pump had been?
A. Yes.
Q. As shown in this photograph, L-9?
A. Yes.
Q. And at that time what condition did you find in that vicinity?
A. You mean what were the conditions—sorry.
Q. The conditions about the vicinity of the pump and the decks.

You may answer my question. I am asking what he found at the time when he came back at 3 o'clock that morning.

A. I was called by Mr. Blaney and told of the accident, and he asked me would I come back and finish the pumping of the ship, which I told him I would. So the approximate time I arrived I couldn't say, but I went aboard the ship to continue the pumping so the ship could—we could finish it up and get the ship out.

Q. And what did you find in the vicinity of these two deck covers, the port and starboard deck covers, which are shown on L-9?
A. Repeat that question.

[Question read.]

A. When I come back aboard the ship this was all roped off, across here [indicating], and across the back, and they had ropes running—lines running back and forth.

Mr. O'Neill: I object that. It is after the accident happened. It is not binding, not showing who did it. Unless this witness knows who did it, I am going to object to it.

The Court: That's right, you have to know who did it, if you are going to show control.

By Mr. Baker:

Q. Who placed those ropes?

A. The ship's crew.

Q. And where were those ropes again, describe it.

[fol. 521] A. They actually tied them across—the ship's side to the ship's side, back and forth across here [indicating] and back and forth across here [indicating].

Q. And it roped off what area?

A. This hole.

Q. This open hold?

A. That's right.

The Court: The port hold.

The Witness: Not the whole hatch cover, just this open end.

The Court: Oh, just the open part of the port side?

The Witness: That's right.

By Mr. Baker:

Q. And this was roped off?

A. That's right.

Q. And what else did you see there with reference to conditions?

A. Everything had been sawdusted down.

Q. And who placed the sawdust there?

A. I don't know. The sawdust was there before I got aboard.

Q. Did your men place any sawdust there?

A. Not that I know of.

Mr. O'Neill: Now, the answer is that he doesn't know.

The Court: The man said he doesn't know, so he doesn't know whether his men did it or anybody else's men. You don't know, is that right?

The Witness: That's true.

The Court: One thing I would like to know, Mr. O'Leary. There has been testimony here that this—this is supposed to be the pump; not a very artistic reproduction—and somebody has said that the pump was partly on this lid and partly on the starboard lid; is that true?

The Witness: Well, I recall it was to this side, probably [fol. 522] it was over in that section there [indicating].

The Court: To your recollection it was all on the lid.

The Witness: She wasn't lapping on the other.

The Court: It was not lapping.

Cross examination [Continued].

By Mr. O'Neill:

Q. Does this show where the pump was, Mr. O'Leary?

The Court: R-2 now.

A. That's the same picture, isn't it, enlarged?

Mr. Cunningham: But, you see, the rectangle in red is a different place in R-2.

A. Not that I recall, no.

Q. Where would you place it?

A. I would place it where I placed it on the other photograph.

Q. Over in here [indicating]?

A. Over towards this way [indicating].

Mr. Baker: When you say "towards this way" you are pointing to the port tank lid.

Q. That is where you ordered it.

A. That's where they put it, yes.

The Court: You keep saying he ordered it there. The man never said that once.

Mr. O'Neill: I think he did say it.

The Court: He said the crew put it there and it was all right with him. Is that right?

The Witness: That's right, as long as they had the suction side leading into the pump.

The Court: That is all you were worrying about, that they had the suction side leading right.

The Witness: In other words, if they turned it this way, [fol. 523] and the suction was out here, we would have to make a big circle to get it to the tank.

By Mr. O'Neill:

Q. Did you direct the crew where to place the pump itself?

A. No.

Q. You just stood there while the crew placed it?

A. That's right.

The Court: He said he was satisfied with where they placed it, too.

Q. Now, how high are those coamings around the tanks?

A. Approximately three feet.

Q. And that is, you say, in spite of the fact they were three feet high, that somebody came there and put ropes around?

A. That's right.

Q. Put ropes around?

A. That's right.

Q. How high above the hold—above this opening were the ropes themselves?

A. Three feet.

Q. And how were they held on this?

A. They were tied over on the outboard side—both outboard sides of the ship, and they had them tied across this way [indicating].

Q. You saw this when you came back?

A. That's right, the ship's crew were doing it.

Q. When you came back?

A. Yes, sir.

Q. This is 3 o'clock in the morning?

A. That's right.

Q. And who did you see of the ship's crew?

A. I wouldn't know who they were.

Q. Wasn't it important for you to know what member of the ship's crew might have been doing a thing like that?

A. At the time I didn't believe so.

[fol. 524] Q. You don't know whether they were ship's crew, do you?

A. Well, I knew they weren't our crew.

Q. Where was this sawdust that you saw?

A. All around the deck and on the cover.

Q. And the oil at this time, of course, had congealed, had it not?

A. I couldn't see the oil with the sawdust.

Q. There was so much sawdust there that you couldn't see the oil?

A. That's right.

Mr. O'Neill: That's all.

Cross examination [Continued].

By Mr. Baker:

Q. When you arrived, you told us before, there was this sawdust there already?

A. That's right.

Q. Did any of your men—were any of your men there before you arrived or you were the first one to arrive of your men?

A. I was the first one to arrive.

Q. So that when you arrived who else came with you?

A. Another mechanic came later, a fellow named Henny Rochell.

Q. And you were the only two from El Dorado?

A. That's right.

Q. Who came aboard the vessel. Were there any El Dorado men there at the time that you came aboard?

A. No, not on the ship.

Q. I mean on the ship.

A. No.

Q. So that when you came aboard with this man that you mentioned all you saw there was ship's crew?

A. That's true.

Q. Did your men have anything to do, in your presence, with placing the sawdust?

A. No.

Q. Do your men have any—do they place sawdust when there is oil there?

A. Not that I have ever known.

[fol. 525] Mr. O'Neill: Now, sir——

The Court: He has only testified as far as he knows he has never seen it. That's all.

Cross examination [Continued].

By Mr. O'Neill:

Q. Don't you salvage this oil that we have been talking about?

A. Yes.

Q. And it is edible oil, isn't it?

A. Yes. Well, it is not edible at that time, it is crude cocoanut.

Q. And this oil is usually scraped back and put in the tanks, isn't it?

A. No.

Q. Did you direct any salvaging of the oil?

A. No.

Q. Were you told they wanted to salvage it?

A. I knew they did it but I never had anything to do with it.

Q. So that these people who went down for this condition you saw, that could have been people from El Dorado down there salvaging as much as they could and then putting the sawdust to prevent any further——

Mr. Cunningham: I object to what could have been. It is a very difficult question for anyone to answer.

The Court: Sustain the objection. He would only be speculating on the answer.

Mr. O'Neill: Well, sir, I think it is pure speculation when he comes back and testifies to something after the accident, and says he found it covered with sawdust.

The Court: If I can send men to jail on circumstantial evidence, I think I can in a civil case draw inferences from circumstantial evidence. He says he knows that his men didn't put the sawdust there.

Mr. O'Neill: Well, all right.

[fol. 526] By Mr. O'Neill:

Q. "His men"—you mean the man who was with you at 3 o'clock in the morning?

A. That's right, the man that came in.

Q. You don't know what happened between the time of the accident and the time that you arrived?

A. No.

Mr. Cunningham: No redirect. If there is no further cross examination I will call my next witness.

Mr. Baker: That is all.

The Court: Do you know of your own knowledge whether there was any work done from the time Mr. Skovgaard fell into the tank until you came?

The Witness: Not that I know of. I wasn't there.

The Court: Not that you know of.

The Witness: No.

Cross examination [Continued].

By Mr. O'Neill:

Q. Did you lower the pump into the tank when you came at 3 o'clock; are you the man that did that?

A. Yes.

Q. And you took down these ropes that the crew had there to get the pump down, didn't you?

A. No, the crew had to move the cover in order to get the pump down.

Q. What?

A. The crew had to move the tank cover in order to get the pump down.

Q. Before they could move the tank cover they had to move the pump.

A. Yes.

Q. So now they were going to take the pump—you ordered that pump brought down below, did you not?

A. That's true.

Q. And yet you say you stood there and watched men put up ropes?

A. That's right.

[fol. 527] Q. Right across this space where you were going to work, is that correct?

A. That's right.

Q. Did you have them take the ropes down?

A. That wasn't up to me. They were doing the loading of the pump and I had nothing to say about it.

Q. And the tank cover, you had nothing to say about that?

A. No, sir; that's ship's gear.

Q. So at the time you went down there there were men tying up ropes, two men running winches and some men moving the pump, is that correct?

A. No.

Q. How many men were working on the pump?

A. Working on the pump?

Q. To move it, to put the slings on it.

A. They had two men down below.

Q. Did you have to break the connections to get the pump down?

A. No.

Q. You let it down with all the suction lines on it?

A. Yes.

Q. You could do that all right?

A. That's right.

Q. Did you tell the men how to lower the pump?

A. Well, we had—we couldn't put the pump on the deck because there was oil on there, so we pumped from a suspended position.

Q. That's the usual position in getting this oil out, the suspended position, in which you hang the pump from the boom, isn't that correct?

A. That's true.

Q. Had anybody told you to put the pump in that position when you went aboard at 3 o'clock?

A. No.

Q. You knew that of yourself?

A. That's right.

Q. And these lines that we are talking about, in spite [fol. 528] of these—I think we had two hoses running over the side, a steam hose and a discharge hose, is that correct?

A. That's right.

Q. And a discharge line running down into the tank. They got that all down with these lines up that you told us about?

A. That's true.

Q. And they were putting them up, as a matter of fact, while they were putting the pump down; is that your testimony?

A. I didn't get that.

Mr. O'Neill: Read it.

[Question read.]

A. No.

Q. Had they stopped?

A. No. In other words, when I was coming down—before we put the pump down, it was an hour later. But when I came aboard the ship they were tying the ropes around the hole, an hour previous to that. Then they had to take them down again in order to get the pump out of the way and move the cover. Then they dropped them.

Q. And how many crewmen were involved in that?

A. Two, plus the ones on deck, which I didn't know how many they had up there.

Q. Aren't you the man who told them to lower the pump down into the hold?

A. That's right.

Q. And how long were you aboard before you told them to do that?

A. Oh, a good hour.

Q. And what took up your hour?

A. What?

Q. What took up your hour?

A. I had to wait for orders to find out whether we were going to do it, or weren't they going to do it.

Q. Now, you told us before nobody had given you any orders.

[fol. 529] A. No.

Q. Were you waiting for the hour——

A. No.

Q. —for somebody to tell you?

A. No. When they told me it was all right to pump, then we ordered the pump lowered.

Q. What time did you actually start the pump?

A. Offhand I don't know.

Q. Well, you say you were there an hour working on this

thing, before the pump was lowered. How long did it take you to get the pump started after it was lowered?

A. We had no trouble at all getting suction.

Q. And you don't know what time you started the pump?

A. No, I wouldn't know.

Q. How many hours were you aboard before the pump started? You came on at 3 o'clock.

A. No, I didn't come on at 3 o'clock. I said I was called from home at 3 o'clock.

Q. What time did you get aboard?

A. Approximately 30, 40 minutes later.

Q. That would be 3:30?

A. Probably so.

Q. Well, how long were you aboard before the pump was started?

A. Offhand I couldn't say.

Q. About an hour?

A. I am not sure.

Q. Two hours?

A. I don't know.

Q. It could be two hours, couldn't it; it could be an hour?

A. I don't know.

Mr. Cunningham: No further cross examination of this witness?

You are excused.

[Witness excused.]

[fol. 530]

Arthur Sampson, called and sworn for the respondent-impleaded, testified as follows:

The Clerk: May we have your full name, please, sir?

The Witness: Arthur Sampson, S-A-M-P-S-O-N.

The Clerk: Your address, for the record?

The Witness: 265 Avenue B, Bayonne, New Jersey.

Direct examination.

By Mr. Cunningham:

Q. Please keep your voice up, Mr. Sampson. I know you don't hear so well, so we will talk more loudly to you.

By whom are you employed? Who do you work for?

A. El Dorado Oil Works.

Q. And how long have you worked for them?

A. Five years.

Q. Did you work for them on December 5, 1952?

A. I have.

Q. And what was your job then?

A. I was standby for the pump.

Q. Now, what does that mean, when did you go on the Tungus, if you ever went on her?

A. I went on the Tungus that night to stand by for the pump there.

Q. About what time?

A. Oh, between 8:30 and nine, I believe. I am not sure of the time.

Q. And how long did you work on the Tungus that night?

A. Till 11 o'clock.

Q. And why did you quit at 11, besides the time for going home?

A. Well, that's the hours I work, three to 11, that's my shift.

Q. Mr. Russo relieved you?

A. That's right.

Q. Now, when you were standby on the pump, will you [fol. 531] tell us, please, in your own words, how the pump was operated?

A. It was working good, very good.

Q. Now, I want to know whether there was a leak from the glands?

A. Yes, it was.

Q. And would you tell me, please, from your experience with pumps, is that a normal leak for the gland?

A. That's a normal leak there for the gland, a drip. They drip all the time.

Q. Was there anything for you to do with the pump when it was operating with a leak from the gland?

A. Well, we had two grease cups there. We greased it—every once in a while put grease there.

Q. But you allowed the drip from the gland to continue?

A. Into the bucket, that's right.

Q. That's the normal operation of the pump.
A. That's normal operation.
Q. And that pump worked that way until you were relieved by Mr. Russo?
A. That's right.

Mr. Cunningham: No further questions.
Mr. O'Neill: I have nothing.
Mr. Baker: Nothing.
The Court: That is all, Mr. Sampson.

[Witness excused.]

Mr. Cunningham: Mr. Donohue, please.

EDWARD DONOHUE, recalled as a witness by the respondent-impleaded, having been previously duly sworn, testified further as follows:

Direct examination.

By Mr. Cunningham:

Q. Mr. Donohue, as I recall your testimony, you testified that during the operation of the pump at one time the [fol. 532] gland smoked and took fire, is that correct?
A. That's right.
Q. Now, will you tell us, please, when that occurred?
A. Well, that occurred after the break, after the nipple had busted off. They stopped the operation of the pump. And when we went ashore, and came back, and installed the fittings in it, got everything back together, we started the pump up. I believe it was about maybe 15 minutes after the pump had been running, there was quite a bit of vibration to the pump, and I believe the vibration caused the excess heat and——
Q. Now, regardless of what the cause was, you are not allowed—I mean, you may not testify as to what you think the cause was, just tell us what the facts were. Was the pump pumping oil at the time these glands took fire?
A. No, we had not—we didn't get suction back at all.

Q. You mean the pump was running without any oil in it at all at that time?

A. That's right, running dry.

Q. Did the glands ever take fire while you were pumping oil through the pump?

A. Oh, no.

Q. All right. Now, did you ever see Mr. Angrosina in your life, this gentleman in the front row?

A. I don't recall him up until today.

Q. Did you ever have lunch with him on the Tungus, particularly on the night of December 5 and 6 of 1952?

A. I did not.

Q. Did you hear Mr. Angrosina testify that you were standing on the main deck at the time Mr. Skovgaard had his accident; did you hear that testimony?

A. I did.

Q. Were you standing on the main deck at that time?

A. I was not.

Q. Where were you?

A. Down in the hold, alongside the pump.

[fol. 533] Q. Did you see the accident happen to Mr. Skovgaard?

A. Yes, sir.

Q. Was Mr. Angrosina down there at that time?

A. No, sir.

Mr. Cunningham: No further questions.

Mr. Baker: No questions.

Cross examination.

By Mr. O'Neill:

Q. Mr. Donohue, do you remember making this statement, "The main reason the maintenance engineer supervises the placing of the pump is to see that the ship's crew do not damage it while raising it to the deck and lowering it into the hold"?

A. That's right.

Q. You made that statement. "And another reason was that there wouldn't be any lost time," do you recall that?

A. I don't recall that, sir.

Q. Now, do you recall making this statement, "I don't recall whether I called Carl before the pump broke or not because we were having trouble with the bearings on the pump and could not get proper suction," do you remember that?

A. No, sir.

Q. You do not remember making that statement?

A. No, sir.

Q. What leads you to believe you called Mr. Skovgaard after the pump let go; is that when you think you called him?

A. I think I called him after the pump had busted down, the nipple busted off, we got it all together again. When we couldn't pick up the suction, I had the fire on the bearings, I didn't think it was any worthwhile doing any more with the pump.

Q. Now, did you have other duties around the plant [fol. 534] this night besides taking care of this ship?

A. Well, I was the maintenance assistant foreman and anything mechanical pertaining to the pier was my responsibility.

Q. And you were on duty around 8 o'clock when they were taking this equipment aboard, were you not?

A. That's right.

Q. You didn't give any instructions to the gentleman that just testified as to what he was to do?

A. No, sir; he has done that job numbers of times before.

Q. Were you his boss?

A. That's right.

Q. Now, did you have anything to do with making this part of the pump, the nipple, or the "T", whatever we call it, did you have anything to do with making that?

A. No, sir; I believe that's been around the plant a long time.

Q. You don't know——

A. No.

Q. —you had nothing to do with it?

A. Nothing to do with it.

Q. Now, Mr. Donohue, I show you this Exhibit, R-2. You squeegeed some oil off this tank top, did you not?

A. That's true.

Q. And how much of an area did you clean around the pump?

A. Maybe three square feet or so.

Q. And about how far in from the edge of the lid?

A. I don't recall.

Q. Now, you intended, did you not, to salvage the oil that spilled out?

A. I didn't intend to do it. There were times that we did salvage oil that had spilt.

Q. Well, let me read you this statement and see if you remember making it. "No sand or sawdust was put down as we intended to salvage the oil."

A. I signed that statement, I guess I made it.

[fol. 535] Q. And by salvaging the oil you mean taking it up and sending it in to the plant to use it, don't you?

A. It's possible.

Mr. O'Neill: That's all.

Mr. Cunningham: No redirect.

Mr. Baker: No questions.

Mr. Cunningham: Thank you, Mr. Donohue.

[Witness excused.]

Patrick J. Sexton, called and sworn for the respondent-impleaded, testified as follows:

The Clerk: May we have your name, sir, please?

The Witness: Patrick J. Sexton.

The Clerk: And your address, for the record?

The Witness: 149 Lord Avenue, Bayonne, New Jersey.

Direct examination.

By Mr. Cunningham:

Q. Mr. Sexton, by whom are you employed at the present time, please?

A. Western Electric Company.

Q. And where is that?

A. Kearny, New Jersey.

Q. How long were you employed by El Dorado?

A. From May of 1949 to May of 1953.

Q. And what was your job on December 5 and 6 of 1952?

A. Receiving and shipping foreman.

Q. Now, do you recall, sir, when you came to work on December 5, 1952?

A. 8:00 a.m.

Q. Do you recall how long you worked that day?

A. Well, I worked until after the accident the following morning.

Q. When did you first go aboard the Tungus, that is, how soon after she came in?

A. I'd say five minutes after the gangways were placed I was aboard.

Q. And what did you do on the ship?

[fol. 536] A. Checked the temperature and the depth of the oil in the tank with the surveyor.

Q. How long would you say you were on the ship doing this, approximately?

A. Approximately 10 minutes.

Q. While you were on the ship did you see the pump being lifted by the ship's derricks, or booms, on to the ship?

A. No, sir; it hadn't started.

Q. Did you see anyone moving the tank lids while you were on the ship?

A. No, sir.

Q. After you were on the ship and were testing the oil, what did you do?

A. I left the ship with the surveyor, traced the line through our plant, sealed off the lines going into smaller tanks, storage tanks that we had in the mill, followed the line out to our farm, sealed off——

Q. To your farm?

A. Tank farm.

Q. I see.

A. —sealed off all other tanks so that no oil could go in there, both before and after the tank that we were going to put the oil from the Tungus into.

Q. In other words, you had to see that the oil went into the right place?

A. That is right.

Q. How long would you say that took, if you have any estimate?

A. That would take from a half hour to three-quarters of an hour.

Q. All right. When did you next go on board the Tungus, if you can recall?

A. I can't recall.

Q. Were you called on board the Tungus for any reason that evening?

A. No, I wasn't called on it during that evening.

Q. Well, can you recall whether or not that evening you ever came back again on the ship?

A. I did go aboard the ship several times.

[fol. 537] Q. Well, we are trying to find out if you can remember what the first time was that you went aboard; about what time was that?

A. Well, it would be shortly after they first started pumping oil. That was before 9 o'clock.

Q. And what was your job on the ship then?

A. All I did was look down to see that the pump was working, then left the ship again—I had other operations in the plant at the time, other men working—went to see that their job was being properly done, went to check the line back to the tank, then go back to the office.

Q. At some time during the evening did it come to your attention that there was a break in the operations of pumping the oil onto the pier?

A. Yes, sir.

Q. Now, who called that to your attention and what were the circumstances surrounding it?

A. I am not sure whether it was Donohue or Russo that called it to my attention.

Q. And what did you do when it was called to your attention?

A. I went directly aboard the ship.

Q. And what time was that, can you recall?

A. Approximately 12 o'clock.

Q. Now, at that time when you went on board the ship

what was the situation with regard to the pump, was it still pumping?

A. No, sir; the pump was not.

Q. Did you have a conversation with the Chief Officer about that time?

A. Not exactly at that time, a little later I did.

Q. Well, when you came aboard for the first time after the break in the pump did you stay on board or did you go ashore again?

A. I attempted to go ashore to see what was being done about repairing the pump. On the way—before I got off the ship, to the gangway, both Donohue and Russo were coming along with new fittings.

[fol. 538] Q. And did you go ashore or did you come back with them?

A. I stayed on the top deck, looking down at them fixing the pump.

Q. Now, would you kindly refer to R-2, which is a photograph, and tell us where you were standing watching Mr. Donohue and Mr. Russo fixing the pump, which side?

A. I was on the shore side.

Q. That would be the starboard side, is that correct?

A. I am not familiar with——

Q. Well, the ship was starboard side to, we have agreed, and this "S" means the starboard side. Is that the side you were standing on?

A. I'd be up around here [indicating].

Q. You are indicating the after end; is that where you were standing?

A. That's where I would be standing, looking down——

Q. Not where you would be standing, where were you actually standing?

A. Close to the gangway. As I say, I am not familiar with port, and starboard, and aft.

Q. You were on the gangway side of the coaming on the main deck?

A. That's right.

Q. And what did you see going on down in the shelter deck where the pump was?

A. I seen Donohue and Russo down there trying to get

the pump started. At that time they had the new fitting put in place.

Q. At that time did you have a conversation with the Chief Officer?

A. No, not at that time.

Q. Did you ever have a conversation with the Chief Officer?

A. Yes, after I had called Mr. Skovgaard.

Q. You mean that you went ashore to call Carl Skovgaard?

A. That's right.

Q. Then came back to the ship?

A. That's right.

[fol. 539] Q. And at that time did you have a conversation with Mr. Folkman, the Chief Officer, sitting in the courtroom?

A. Yes, I believe—I had it with one of the officers on the ship.

Q. Can you tell us whether you can recall the exact words of the conversation at the time?

A. Not the exact words.

Q. Will you tell us the nature of the conversation?

A. Yes, I had a heated discussion with him. He wanted me to sign a statement covering damaged materials that I could not see, that were in the lower hold of the ship. He wouldn't unbutton the hatch covers, so I wouldn't sign the statement.

Q. Did you have any conversation concerning the placing of sand and sawdust in the shelter deck?

A. No, sir.

Q. Did you ever have any conversation with the Chief Officer concerning the placing of sawdust and sand in the shelter deck?

A. No, sir.

Q. Did you ever instruct him, or talk to him about the placing of sand and sawdust in the shelter deck?

A. No, sir.

Q. Did Mr. Skovgaard subsequently come aboard the ship?

A. During the discussion with the officer Mr. Skovgaard came aboard the ship.

Q. Was Mr. Skovgaard there while you had the conversation with Mr. Folkman, the Chief Officer?

A. He left during the conversation to go down below, or he went down below.

Q. He went down below. Did you see Mr. Skovgaard go below?

A. No, I did not.

Q. What were you doing at that time?

A. My back was turned. I was arguing with the officer.

Q. All right. How long did you have this conversation with the Chief Officer?

A. Oh, a few minutes, five minutes at the most.

[fol. 540] Q. And then what did he do and what did you do?

A. I walked away from him and went back to the coaming to look down and see what was going on.

Q. Are you still on the shore side, on the starboard side of the ship?

A. Yes, sir.

Q. The side close to the shore?

A. The side close to the hatchway.

Q. To the gangway.

A. The gangway, that's right.

Q. And what did you see when you were watching down there?

A. Well, I could see Carl at the end of the tank.

Q. Wait.

A. Over here [indicating].

Q. "Over here" is not sufficient.

A. All right.

Q. Where?

A. The ship is this way [indicating]. I have a feeling the gangway was on this side.

The Court: He was in front or aft of the port side tank.

The Witness: He would be over here [indicating].

By Mr. Cunningham:

Q. Indicating the after port corner of the shelter deck.

A. If that is what it is called, yes.

Q. Well, is this the point you are pointing out?

A. Yes.

Q. Now, what did you see from there on?

A. Well, he was giving instructions to Russo and Donohue——

Mr. O'Neill: What did you see, not what you heard. What did you see him do?

By Mr. Cunningham:

Q. What did you see him do?

A. Giving instructions, pointing to the pump and telling them what to do. I couldn't hear what he said to them [fol. 541] I was up on top.

Q. You saw him pointing, as you have indicated, and also heard him say something.

A. What it was, I couldn't hear.

Q. How long did he stay there?

A. Oh, five minutes.

Q. Then what happened?

A. He walked over, around——

Q. Pointing around the after end of the port tank.

A. And he put one foot up on the beam.

Q. Indicating the beam between the tanks. All right.

A. Between the tanks.

Q. Go on.

A. Well, he had the one foot on the beam, and he put the other foot—or attempted to put the other foot on the hatch cover, and that's when he slipped.

Q. Would you tell me, please, whether Mr. Russo and Mr. Donohue were there at that time?

A. Both of them were in the vicinity of the tank, within a foot or two of the pump, within a hand's reach.

Q. Did you ever see Mr. Angrosina, the man in the front row here, before?

A. I remember seeing him on a ship. Now, whether it was that particular ship or not—we had several in—I don't remember whether it was that particular ship or not. I do have a recollection of seeing him before.

Q. Do you have any recollection of his being around the hatchway at the time of the accident?

A. No, I have not.

Q. Well, after the accident occurred what happened?

A. I immediately left the ship and went up to my office on the pier to call the ambulance, to call the hospital.

Q. Did you see what Russo or Donohue did?

A. No, I did not.

Q. And did you call the ambulance?

A. Yes, I did.

[fol. 542] Q. And is that all you know about this accident?

A. Well, on my way back from the office, the officer was running up the pier, wanted to know if we had a stretcher. I have one in the office. I went back to the office with him. It was a metal stretcher.

Q. What officer was that, the same officer with whom you had the conversation?

A. The same officer I had the argument—the conversation aboard the ship with.

Q. Mr. Folkman here?

A. I believe it was him, yes.

Q. Is that all?

A. On the way back to the ship I had the back end of it and he went up the gangway first. And as we were going up I said, "Is he all right?" He said, "Oh, no, he is finished, he is dead." So I said, "Well, I am not going aboard the ship." And I left it right at the top of the gangway with him. I came down then and immediately called for a priest.

Mr. Cunningham: All right. Thank you.

Cross examination.

By Mr. O'Neill:

Q. What time did you first find out that there was a ship coming in?

A. It was several days—or the day before at least.

Q. And what time did you start to work this day?

A. 8:00 a.m.

Q. Were you in charge of this entire operation?

A. As far as the receiving, yes.

Q. And how about the pumping?

A. Once the pump was placed and operating, it was my—receival of the oil was my responsibility.

Q. What time did you first go aboard the ship?

A. Immediately after it was tied up.

Q. What time was that, what is your recollection on [fol. 543] that?

A. It was 5:30, or thereabouts, in the afternoon.

Q. And how long did you stay aboard?

A. About 10 minutes.

Q. And what happened while you were aboard?

A. The surveyor and myself took the temperatures of the top, bottom and center.

Q. And how did you take the sample?

A. Through a—I am not familiar with the terms—it is like a peephole that is there on top, that you can put the sample cans through.

Q. And were you there when the surveyor took the samples through the open tank top?

A. No, I was not.

Q. That's usual, isn't it?

A. I was satisfied with—my company was satisfied with the samples from the peephole, as I referred to it—as I will call it.

Q. You were satisfied with that sample and you left?

A. I left with the surveyor to go through our lines.

The Court: To go through what?

The Witness: To go through the pier, the mill building, out to our tank farm, to seal off the lines, with the surveyor, and to take temperatures and oil test of the tank that we were to place the oil in.

By Mr. O'Neill:

Q. Now, did you have a conversation with the surveyor about the placing of the pump?

A. No, I did not.

Q. Was there any talk about whether or not this pump would do better on the deck or on the tank top?

A. Not to my knowledge.

Q. You don't recall it?

A. No, sir.

Q. Were you here when the surveyor testified?

A. No—well, I was here for part of the testimony of the surveyor.

[fol. 544] Q. And what is this, that he testified to, that after you take off the tank top you then take samples from these four corners?

A. The surveyor that testified in this court is not the surveyor I took the samples with.

Q. You had another man?

A. We took—the people that owned the oil—P. V. O., as we refer to them—they had their surveyor there.

Q. Did you see the surveyor there at all that testified in court here?

A. Not at our plant, no, I did not. I don't recall seeing him. He could have been there, but——

Q. You don't recall.

A. —I don't recall. His business was with the owners of the oils and the steamship company. I did not come into the picture.

Q. Well, don't the surveyors work together and don't you work with the surveyors?

A. We work as closely as we can together, yes.

Q. Well, now, didn't he board the ship as soon as she arrived?

A. He could have been on the ship when it arrived. He was representing the steamship.

Q. Well, how many people did you see taking samples?

A. There was only the surveyor representing P. V. O. and myself.

Q. And how did you get down between decks?

A. I climbed down the ladder.

Q. Well, they had to take and open the main deck hatch, didn't they?

A. That was open by the time I went aboard, that was off.

Q. And when you went down the tank cover was still on?

A. Yes, sir.

Q. The tank lid. Now, who from your company was [fol. 545] down there at that time?

A. At that time I was the only one representing El Dorado.

Q. And that was about what time?

A. About 5:30, 5:45 in the afternoon.

Q. Now, when did you next go aboard the ship?

A. After I had been told that the pump was started and the operation was started. That was approximately 8:30 to 9 o'clock that evening.

Q. Were there any surveyors there when you went aboard that time?

A. I can't recall seeing any, no.

Q. Did you take a look at the setup of the pump and the tank lid at 8 o'clock?

A. From the top deck, yes. Not at 8 o'clock, I said between 8:30 and nine, when I went aboard the ship.

Q. Did that meet with your approval?

A. It was pumping satisfactorily.

Q. Well, now, you were in entire charge of this operation, weren't you?

A. As far as receiving the oil, seeing that it was put in the right storage place, yes.

Q. Now, do you remember making a statement on December 15—December 17, 1952, to the insurance company that represented your company on this oil situation?

A. I made several statements.

Mr. Baker: Which company—there are a number of insurance companies—so we can locate the statement involved.

Mr. Watson: Employers' Mutual of Warsaw, Orange, New Jersey.

A. [continuing] I don't remember just who it was. Any statements I made were in the office in the presence of the superintendent of the plant.

By Mr. O'Neill:

[fol. 546] Q. Did you make this statement—is this your signature? Let me ask you that first.

A. Yes, that is.

Q. "I was in complete charge of this operation. I had a maintenance helper by the name of Salvatore Russo working under me, and he was operating the pump."

A. Yes, I would have made that statement.

Q. Well, what do you mean by being in complete charge of something?

A. I was in complete charge of the receival of the oil, to see that it was discharged in good condition. If it were contaminated in any way we would not allow it to go into our good oil, to mix in with it.

Q. And did you have anything to say about the way these men pumped this oil out of the tanks, that is, your crew that you had down there, the pump crew?

A. Not until the pump was set. After the pump was set, as long as it was working, that's—my responsibility ended there.

Q. And if the pump didn't work later on, that was none of your concern?

A. Yes, if it didn't work it was my concern to see that a maintenance man was immediately called.

Q. Now, did you tell anybody that you intended to scrape up and salvage the oil that was on the deck of this ship?

A. I could have.

Q. Well, did you?

A. I don't recall.

Q. Is this your signature?

A. Yes.

Q. And will you read from here, "After we had repaired the fitting and got the pump operating we intended to scrape up the oil that had spilled and dump it back into the tank."

A. Yes, I could have made that statement.

Q. Well,——

A. It wouldn't be customary to dump it back into the [fol. 547] tank. It would have congealed by that time.

Q. Just a moment. You read this before you signed it, didn't you, Mr. Sexton?

A. Yes.

Q. And you initialed certain changes on this statement?

A. I remember initialing changes.

Q. Now, you deny any conversation about sand or sawdust?

A. Yes, I do.

Q. You would use sand or sawdust on oil, would you?

A. I never did.

Q. What about this time?

A. In my estimation at the time sand or sawdust was not necessary.

Q. Why not?

A. Because the area where the men were working had been squeegeed, that area was clear. Later on when the other oil—when we could have gotten people——

Q. Let's get that time first.

A. All right.

Q. You say, in your opinion, after looking down it wasn't necessary to use sand and sawdust because the men had squeegeed the working area?

A. They had already squeegeed the working area.

Q. Now, where was the working area that you refer to, Mr. Sexton?

A. Well, if the pump was here [indicating], it was around the pump.

Q. And about how far on each side of the pump would you say it extended?

A. I'd say at least two foot, three foot.

Q. And about what time was that, that they had done that, Mr. Sexton?

A. The best of my recollection, I'd say about 11:30.

Q. So you had had a leak there at 11:30. So was that the second time you went aboard the ship, at 11:30?

A. I was aboard the ship several times. There was no special time for me to go aboard the ship.

[fol. 548] Q. And this leak——

A. It was after the leak that they had—while the pump was down, before they attempted to repair it, put the new fitting in, that they squeegeed the area, where they would have to work, and it would take two men to work.

Q. I see. Now, then, you went ashore again?

A. After the pump was started I went ashore again.

Q. Well, was the pump stopped at this time, at 11:30?

A. It was after—if I said 11:30—it was after the break in the line, when they were putting the fitting in. Now, if that was—I'm not sure of the 11:30.

Q. But sometime later you were told by somebody that—or how did you find out about the fitting letting go?

A. I had another group of people working on the pier at the time. I came down from the mill to the pier. On the way down, it was one of the fellows that was receiving soya bean—or one of the crew that was cutting the bags of soya bean that gave me that information. I went aboard the ship. There was nobody with the pump. I went to leave the ship and on the way to leave Donohue and Russo came aboard with the fitting.

Q. And then Donohue and Russo went down and cleared this area to work, which you thought was sufficient for the crew working on this pump, is that correct?

A. That's right.

Q. Now, did you stay there at that time, on the ship?

A. I stayed there until the fitting was installed. After a little while, when they kept turning the pump on and off, could not get suction, that is when I left to call Mr. Skovgaard.

Q. Now, this oil was on the tank—on the hatch covers in back, forward of the tanks, was it, here?

A. I can't say that I seen it there. I wasn't down in the 'tween deck at all. I was up on the top deck.

[fol. 549] Q. Well, looking down you saw the oil where?

A. I seen that they cleaned this area around the pump.

Q. Indicating a two-foot or three-foot area.

A. Two- or three-foot area.

Q. On Respondent's Exhibit 2. You saw that they had cleaned that?

A. I saw them squeegee it.

Q. Now, as receiving clerk in charge of receiving the oil, it would be up to you to say whether or not anything could be put on that oil so it wouldn't be left slippery, isn't that so?

A. That is so, yes.

Q. And after inspecting that area you gave no instructions to the men that were working there, is that correct?

A. In my opinion, at that time I thought that the area was clean enough. They had squeegeed it.

Q. So the answer to it is you gave no instructions?

A. I gave no instructions, no.

Q. Now, then, that was around what time, 12:15, 12:30?

A. Well, it was after midnight.

Q. After midnight. And they got the pump started—or they tried to start the pump, they fixed the fitting——

A. They started the pump and they could not get suction.

Q. How long did you stay there at that time, Mr. Sexton?

A. Oh, 10 or 15 minutes.

Q. That would take you off the ship about 12:30?

A. Well, it was after 12 o'clock when I left the ship.

Q. What is a head gasket on this pump?

A. I am not familiar with the—I know the workings of a pump, but a head gasket—I know there are three different gaskets. I imagine it is the one on the top.

[fol. 550] Q. Do you remember making this statement, "About 12:35 on December 6, 1952, Russo noticed that the pump was leaking around the head gasket, so he walked away from the pump to get a rag to wipe it off so he could check it and locate the leak," do you recall that?

A. No, I do not.

Q. Is this your signature?

A. Yes.

Q. Correct, is it?

A. Yes, it is. I made the statement. It is my signature.

The Court: You now say you don't know what a head gasket is?

The Witness: If I was referring to a head gasket at the time, it was around the gland. I know the two fittings, where the grease cups are, and the two nuts around the packing. So I would refer to that as a head gasket.

By Mr. O'Neill:

Q. Where did you say the oil was?

The Court: Hold it. How long do you expect to go with this gentleman on cross examination?

Mr. O'Neill: Well, I want to be honest with you, your Honor. You know what they say, one question leads to another. Maybe a half hour or so.

The Court: We will adjourn till tomorrow morning at 10:15 a.m.

How many more witnesses are we going to hear tomorrow?

Mr. Cunningham: It is now the respondent-impleaded's case and I intend Mr. Sexton to be the last witness. Unless other of these men are called in rebuttal, that is all.

The Court: Well, you decide between now and tomorrow [fol. 551] morning what you are going to do. 10:15 o'clock.

[Whereupon, the hearing was adjourned to be resumed Thursday, November 10, 1955, at 10:15 a.m.]

[Trial resumed pursuant to adjournment.]

[Appearances as previously noted.]

The Court: Do you think we will finish this morning, Mr. O'Neill and Mr. Baker?

Mr. O'Neill: I think so.

Mr. Baker: Yes.

Mr. Cunningham: As I recall, Mr. Sexton was on the stand on cross examination.

The Court: That's right, sir. Mr. Sexton, please.

Mr. O'Neill: Mr. Reporter, would you let me have the last question, please?

[Last question from previous day read.]

PATRICK J. SEXTON, resumed the stand.

Cross examination [Continued].

By Mr. O'Neill:

Q. Where do you say the oil was, Mr. Sexton?

A. It was all over the tank covers, with the exception of the area that they had squeegeed around the pump.

Q. In that question I referred to the oil coming out of the pump. You were talking about the gasket and in that question I referred to the oil that was coming out of the pump itself.

A. There was no excessive amount of oil there. We had [fol. 552] a bucket at all times, with a wire hooked around the gland so that the oil would drip into that bucket. When the bucket would fill up we would dump it into the tank.

Q. In other words, you salvage as much of this oil as possible, is that it?

A. That oil, there is nothing wrong with it.

Q. Now, I think you said you came down on the ship at 5 o'clock, is that correct, around five?

A. After the ship tied up.

Q. And you had been working from what time that day?

A. 8:00 a.m.

Q. And you went aboard the ship with the surveyor?

A. That's right.

Q. And did you do anything with respect to these soundings or samples?

A. I put our oil cans into the tank to get a sample. And I also took the temperature, with an El Dorado temperature gauge.

Q. Now, you made notes of those, did you, or did the surveyor make the notes?

A. I made notes and the surveyor made notes of them.

Q. So down there at this temperature gauge you had no trouble reading it, did you?

A. No, I did not.

Q. And, of course, it was dark outside at that time, was it?

A. It was dusk.

Q. Now, then, you left the ship, I think you told us, to check up on some lines leading to the tank field?

A. That's right.

Q. And when was the next time that you went aboard the ship?

A. I don't believe I went aboard the ship until after I was notified that they had started to pump. And that was around 8:30 or thereabouts.

Q. And before you went aboard the ship had you been [fol. 553] talking to the Chief Officer about having a man down to watch you pump?

A. No, I had not.

Q. And where did you stay from the time you looked at your lines until you went down on the ship?

A. I had other duties in the plant that I was supervising.

Q. You mean other than taking care of this ship?

A. That's right.

Q. And you left the ship then in charge of this man that testified yesterday—I forget the gentleman's name, a little bit deaf.

Mr. Cunningham: Mr. Sampson. But I object to the question—left the ship in charge. I wouldn't have any objection if Mr. O'Neill alters the question to say "left the discharge of oil in charge"—is that what you mean, sir?

Mr. O'Neill: That's right. I will accept that amendment, sir.

A. Yes, I did.

The Court: That was Mr. Sampson?

Mr. Cunningham: That's right, sir.

By Mr. O'Neill:

Q. And you had no conversation with anybody between that time and the time you were notified that there was something wrong on the ship?

A. Not that I recall.

Q. There was a little trouble with the pump, was there not, around 10 o'clock?

A. Not to my knowledge, no.

Q. It wasn't called to your attention?

A. No, it was not.

Q. Now, is this statement true, that you were in complete charge of this operation?

A. As far as receiving, yes.

Q. Well, you didn't limit it to receiving at the time you made a statement on December 17, 1952, did you?

[fol. 554] A. What statement did I make?

[Document shown to the witness.]

Q. Will you read from here, sir? Read it out loud, please.

A. "I was in complete charge of this operation. I had a maintenance helper by the name of Salvatore Russo working under me, and he was operating the pump. He was employed by the El Dorado Oil Works."

Q. Now you say you were just in complete charge of receiving the oil, is that it?

A. Salvatore Russo was loaned from the Maintenance Department, which was due to a union deal that we had down there, Salvatore Russo was connected with the Maintenance Department and we had to have a maintenance man on the pump.

Q. Well, Salvatore Russo didn't come aboard until 12 o'clock, did he?

A. He was on the eleven to seven shift.

Q. He came aboard at eleven?

A. That's right.

Q. Did you have an assistant before eleven?

A. Sampson.

Q. But you were the only man at the plant who knew about the equipment to be supplied to this ship, weren't you, for receiving the oil?

A. No, the Maintenance Department. That was a maintenance function, for hooking the pump and the lines.

Q. Now, you are familiar, are you not—since you were receiving clerk down there—with this bulk carriage of oil contract?

A. With the contract itself; no, sir.

Q. Did you at the time you made this statement, or about the time you made this statement, in December, 1952, did your office send a copy of the contract to the people who carried your insurance?

A. The office could have. I had nothing to do with the main office.

Q. Now, as a receiving man, are you familiar with that contract?

[fol. 555] [Document shown to the witness.]

A. No, I am not.

Q. You have never seen one of those?

A. I have seen them, but I am not familiar with them.

Q. Is that the type of contract that you usually carry the oil under which you discharge?

A. I am saying I am not familiar with the contract.

Q. You have seen it, haven't you?

A. I have seen contracts similar to it. I am not saying whether it was the same as this or not. They are similar.

Q. And they all have on top Cocoanut Oil in Bulk Contract?

A. I don't know. That was a Traffic Department function.

Mr. O'Neill: Your Honor, at this time I am going to offer in evidence the file of the company that carried the insurance for—evidently on this pump, or any damage caused by the pump. And I am particularly interested——

I will show it to Mr. Cunningham. Maybe we can save a little time.

Mr. Cunningham: The entire file of an insurance company?

Mr. O'Neill: I say I want to talk to you a minute.

[Consultation between counsel.]

The Court: Was Mr. Blaney your immediate superior, Mr. Sexton?

The Witness: No, my immediate superior was Clarence Holtz. He was the traffic manager.

Mr. Cunningham: If your Honor please, this contract is a contract which Mr. O'Neill, I think, is offering. The purpose of offering the file of the insurance company, as I [fol. 556] understand it, was to offer this contract, which is the same contract, which is referred to on Mr. O'Neill's case.

This contract is dated September 23, 1952, and it is made between Macondray & Company, Inc., as agents for the Tungus, and Lu Do & Lu Ym Corporation for the shippers, who evidently were representatives of the shippers at Cebu —that is, the owners of the oil at Cebu.

And the contract contains the clause which Mr. O'Neill has already read concerning the oil being discharged by the shipper and also contains a clause concerning the liability for demurrage.

I have no knowledge, sir, as to whether this was the contract under which this particular shipment of oil was shipped. Therefore, I have an objection to it going into evidence because I don't have any knowledge.

Now, there is a letter which is in that contract—or was in that file, and I presume if the person who is here with the file would testify he would testify that that letter was received by them and it was——

Mr. Watson: It was sent by them to El Dorado.

Mr. Cunningham: Well, that is not proof. Have you any letters from El Dorado?

Mr. Watson: It was given by hand to Mr. Banta, who is here. The contract was given by hand to him in return with a letter.

Mr. Cunningham: Well, I don't want to be put in a position, as a lawyer for El Dorado, of agreeing to the introduction of a contract with which I am not familiar. And if it is proven to your Honor by Mr. Banta that this [fol. 557] contract was the one under which the oil was shipped, then of course I will have no objection.

But I respectfully request that I be not put in the position of admitting that this is the contract, even though I am virtually certain that it is, because I am not sure. So I am going to object, with that explanation.

Mr. O'Neill: I am going to say this, sir. I just noticed here, this is the contract that was given to Mr. Banta.

Mr. Cunningham, will you step forward a minute, please? They are all the same.

[Document shown to counsel.]

Mr. Cunningham: Well, that is a copy of this.

Mr. Watson: No, it's the same form.

Mr. Cunningham: Oh, a different oil shipment.

Mr. Watson: A different shipment.

Mr. O'Neill: When these people wanted a copy of the contract under which they were going to work this is what they gave them, which is a copy of this.

Mr. Watson: It is the same form, an earlier shipment.

Mr. Cunningham: The same form of contract.

Mr. O'Neill: Yes.

The Court: You want to establish that the contract which he wants to offer now is the one under which this operation was conducted?

Mr. Cunningham: No, it has nothing to do with the operation itself. It's a contract between the shipper of the oil in the Philippines and the agent for the ship in the Philippines, and in the contract, which is according to the bill of lading, the contract concerning this shipment of oil, [fol. 558] the shipper—that is, the man who owned the oil

in Cebu, in the Philippines, is required to discharge the oil. And I suppose we are considered—if the contract may be read so—as an agent for the shipper in discharging the oil.

Now, in answering Interrogatories we have admitted we had the obligation to discharge the oil. And, therefore, for some reasons, at least, the contract might be redundant. Certainly Clause 7, which merely says that the shipper has the obligation to discharge the oil, has already been admitted by us in our answers to Interrogatories.

This question of demurrage, I don't know anything about whether or not our corporation might be charged with demurrage if the oil were not discharged within a certain time. Perhaps Mr. Sexton can help us on that.

Is it the custom that El Dorado be charged demurrage if the oil is not shipped—or taken out of the ship within a certain time, do you know?

The Witness: For certain, I don't know. That was a Traffic Department function again.

Mr. Cunningham: Well, he is in the same position I am.

Mr. O'Neill: I say this. The reason I want to offer it is this. There has been testimony here before your Honor that one of the things they were doing here was—they had to worry about the time element on demurrage. And I think that may be very important in this case. At least I think it should be before the Court, because these people here are not just a crowd that were picked up outside, they had special equipment for this work, they had men specially [fol. 559] geared for it, and they knew what they were supposed to do. This is a special operation that the ship had nothing to do with; the ship wasn't equipped to do it, as Mr. Sexton, I think, has testified.

The Witness: I didn't say the ship wasn't equipped to do it. They may have been equipped. We were using El Dorado equipment, I did say that. There were ships that were equipped that came in to us. We had barges came (sic) in that were equipped.

Mr. O'Neill: That's a different thing. Those barges are special. They are loaded alongside of a ship in Brooklyn, or some place else, and taken over to your pier, isn't that right?

The Witness: We also had ships come in that we used a pump from the ship.

The Court: Where does that leave us now? Mr. Cunningham objects, is that right?

Mr. Cunningham: I object for that reason. I object because of my duty to my client. I just can't agree——

The Court: Don't make a speech about it. You object.

Mr. Cunningham: I object. But I mean my objection is not made on a technical ground for any reason such as an ordinary objection.

The Court: Frankly, I don't see how it helps us very much anyway. Do you want me to infer from the fact that there might be a charge for demurrage that they were hurrying?

Mr. O'Neill: No, no. I say this. I say it is an element in the case. I don't say your Honor would do anything about it. It would be strictly, as much of the testimony is in a case of this type, for the weight of it. I don't say, sir, [fol. 560] this one element could possibly determine a decision.

The Court: I don't see how it is going to help me at all.

Mr. O'Neill: May I mark it for identification?

The Court: You may do that, sir.

The Clerk: It has been marked.

Mr. Watson: Respondent's Exhibit 5 for identification.

By Mr. O'Neill:

Q. Now, on this particular ship, Mr. Sexton, she didn't have the gear to discharge herself, did she?

A. We didn't use ship's gear. Whether it had the gear aboard, I don't know.

Q. Did you check to see whether or not she had it on board?

A. We were told we were to use—the traffic manager, who I reported to, told me we were going to use our pump.

Q. Now, what type of ship usually has her own equipment?

A. Again I am not familiar with ships. There were ships that came in with their own equipment on it.

Q. Did you say this in giving your statement, "This

ship was a freighter. With ships of this type the usual procedure is for us to supply the pumps and the hose lines used in discharging the oil because these ships do not supply their own"?

Mr. Baker: Just a moment. Could we, for the purpose of the record, ascertain what statement counsel is reading from, because there are several statements.

Mr. O'Neill: This is a statement dated December 17, 1952. It hasn't been offered because it hasn't been contradicted.

Mr. Baker: May we ask that it be marked for identification.

The Court: Yes, you might as well mark it for identification.

[fol. 561] The Clerk. The statement will be marked R-11 for identification.

[Marked Exhibit R-11 for identification.]

By Mr. O'Neill:

Q. Mr. Sexton, at 12 o'clock——

The Court: Do you want that answer about the freighters now?

Mr. O'Neill: I thought he had answered it.

The Court: There was a question pending, wasn't there?

[Question read.]

A. If that is in the statement that I signed, I said it. I don't recall saying it.

Q. Now, when you went aboard the ship at 12 o'clock—that was the next time you were aboard after you took these readings that you told us about.

A. No, it wasn't the next time.

Q. When was the next time you were aboard after?

A. After they started pumping. And I was aboard several times after that. There was no regular schedule for me.

Q. What was the next time you were aboard?

A. I don't recall the time. I was aboard several times.

I could have been aboard for 10 minutes, and walked off for five minutes, and decided to go back on again.

Q. They started pumping at 8 o'clock?

A. It was after eight.

Q. Then you went aboard several times?

A. That's right.

Q. Well, what would that mean, would that mean you were aboard nine, 10, 11; just what does it mean?

[fol. 562] A. It could have meant that I was aboard at a quarter of nine, and left at five to nine, and went back again at five after nine. There was no regular schedule.

Q. Were you there about 11:30?

A. After the break I was there.

Q. Were you there at 11:30, before 12 o'clock?

A. I don't know whether I was there at 11:30 or not. It was immediately after the break, when the pump was shut down.

Q. You can't recall when you were aboard before the break; you can't recall what time you were aboard?

A. Not the specific time, no.

Q. Then when you went up and saw the break—or did you see the break; was the oil coming out?

A. No, it was not.

Q. Everything was stopped?

A. That's right.

Q. There wasn't any oil shooting around at all?

A. No, there was not.

Q. Do you know where the oil that came out of the pump went?

A. Where the oil came from the pump?

Q. In which direction.

A. Well, the nipple was facing upwards, so the oil would have to—[indicating].

[Photograph handed to witness.]

The Court: If you don't know, don't guess.

A. [continuing] I don't know exactly which side of the pump the fitting was.

Q. You don't know which way the oil went as it came out of the fitting?

A. Depending on which side of the pump it was on.

Q. Do you know what caused the nipple to break?

A. Only what I have heard, that it was vibration.

[fol. 563] Q. Well, in your statement you say, "It broke because of normal vibration in the use of the pump."

A. Vibration. I just said the same thing now.

Q. All right. Did you say this, "As a result the oil shot out through the opening where the nipple broke towards the forward part of the ship"?

A. That was from observation. I didn't say that I had seen it. I say it was from observation, from seeing the oil after going aboard.

Q. And you saw the oil where? This is aft and this is forward [indicating].

A. Well, if it shot forward the nipple must have been on this side of the pump. The adapter then would be over here.

Q. Shot back this way [indicating]?

A. If that is what is in the statement.

Q. And that would mean the oil was on the tank tops here?

A. Yes, it was.

Q. Now, when you were aboard there—about what time was the break, in your opinion?

A. Well, it was before 12. Shortly after Russo came on duty.

Q. And Russo came on duty, you told us, about 11 o'clock.

A. That was his shift.

Q. And shortly after he came aboard you had the break?

A. That's right.

Q. And about what time was that, in your opinion?

A. Well, it could be 20 minutes, a half hour later, 15 minutes.

Q. And when you came aboard the pump was stopped and Russo—where was Russo?

A. When I came aboard neither Russo nor Donohue—the pump was stopped—there was neither of them down at the pump, because I turned to leave the ship, to find

[fol. 564] out where they were, and they were both coming off the gangway with the fittings to repair the pump.

Q. When you first went aboard there was nobody there.

A. After the break, when I went aboard at that time.

Q. And then you went looking to see where they were, is that it?

A. I turned to leave the ship, and they were coming off the gangway, before I could reach it, with the fittings to repair the pump.

Q. And you then discovered this break yourself, and you went aboard, is that it?

A. No, the break had been discovered prior to that. The pump had been shut down. It was one of the fellows that were working on the soya bean that told me about the break. That is why I went aboard at that particular time.

Q. Now, then, did you stay there while they worked repairing the nipple?

A. I don't recall if I spent all the time that they were there.

Q. Well, now did you stay there until they got the pump fixed?

A. I was aboard when the pump was fixed. I didn't stay there—I can't recall whether I stayed there all the time.

Q. But you came back again?

A. Yes, I did.

Q. About what time was that?

A. About 10, 15 minutes later.

Q. That would be somewhere around 12:45, is that it?

A. I'd say that would be around 12 o'clock, a little after 12 o'clock.

Q. You think it took Russo and Donohue about a half hour to repair the pump, is that it?

A. No, I don't think it took them that long.

Q. Now, after you came back and the pump was repaired, what did you do then?

A. I stayed up on the top deck, looking down at them [fol. 565] throwing the switch, trying to get suction. And they couldn't get the suction.

Q. And did you give any instructions to them?

A. No, I couldn't give them any instructions. I didn't know what instructions to give them.

Q. In other words, you didn't know about dropping this pump down in the hatch so she could continue to pump?

A. I had seen it done before, but I didn't know whether that would be the answer at this particular time or not.

Q. Now, then, did you go ashore?

A. I did.

Q. About how long did you watch them trying to start the pump before you went ashore?

A. Ten or 15 minutes.

Q. And about what time would that be?

A. I'd say that would bring us a little after 12.

Q. A little after 12. And what did you do when you went ashore?

A. I called Mr. Skovgaard.

Q. And what did you tell him?

A. Well, the best of my recollection, I explained to him what had happened, and that they could not get suction, they had made several attempts to bleed the line, and I thought that it would be advisable if he came down, because it was a cold night and I was afraid that the oil in the lines, not only the oil in the tank, would congeal, and that we would be in trouble then.

Q. Did you tell him that there had been an oil spill?

A. I explained to him what had happened, that the nipple had broke.

Q. And did you tell him that there was oil in the 'tween decks?

A. No, I don't recall the conversation to that effect.

Q. You just told him to come down?

A. I asked him to come down.

Q. And what time did he come down?

[fol. 566] A. I'd say he was—within 20 minutes after I spoke to him, 25 minutes.

Q. Now, do you know had Russo and Donohue stopped trying to bleed the pump and run it at the time you left, a little after 12?

A. From what I have heard here in testimony. I didn't know it at that time.

Q. They had stopped.

A. They had given up, I imagine, from what I heard here.

Q. And then there wasn't anything done on that pump until Mr. Skovgaard came, is that correct?

A. I don't know.

Q. You didn't go back aboard?

A. I did go back aboard. At the time I went aboard that was my first conversation with the Mate.

Q. Now, there wasn't any thing being done on the pump when you went back aboard?

A. I don't recall.

Q. There was no reason for anybody to be down in the hold at that time, if they weren't working, was there?

A. They were down in the hold, that I know.

Q. And this was before one o'clock?

A. Yes, I'd say it was before one o'clock, or thereabouts.

Q. Now, you say you had a conversation with the Mate at that time?

A. That's right.

Q. And that is the time—I think you referred—you talked about the damage to the cargo?

A. That's right.

Q. And he asked you at that time to sign a statement because the damage was El Dorado's?

A. That's right.

Q. And why didn't you sign the statement?

A. Because it was just like signing a blank check. There was nothing on the statement. He wanted me to sign a blank statement, that the next day, when he had the whole complement there, or whatever it would be, [fol. 567] that he would take covers off the other tanks, that they were supposedly rugs—supposedly rugs in the hatch, or in the tank, whatever he referred to.

Q. And the only reason you didn't accept responsibility was because it was a blank statement, is that it?

A. That's right.

The Court: A very good reason, incidentally.

Mr. O'Neill: I agree with that, sir.

By Mr. O'Neill:

Q. Later on you did accept responsibility for what damage there was, didn't you?

A. I didn't sign any statement accepting the responsibility.

Q. Now, you were up on the deck, you say, having a talk with the Mate when Mr. Skovgaard came aboard?

A. That's right.

Q. Were you in court when Mr. Russo testified the first time?

A. I believe I was. That was the first day. I was here the first day in court.

Q. When you looked down just before Mr. Skovgaard came on, and you looked down, was there oil down there then?

A. There was oil on the tank covers, yes.

Q. And how about here [indicating]?

A. I don't know. I can't say that I seen oil there.

Q. The only place you saw oil was right——

A. The only place that I can remember looking was where the man—where the pump was and where the men were working.

Q. And how did Mr. Skovgaard come down at that time?

A. I don't know. I was talking to the Mate. The next thing——

The Court: You don't have to explain it. If you don't know, you don't know. That's all.

By Mr. O'Neill:

[fol. 568] Q. Now, then, after talking to the Mate, about how long after that did the accident happen?

A. It was shortly after that. I don't know—five minutes, 10 minutes.

Q. And then this heated argument with the Mate. In the meantime you had left and gone over and taken a position on the main deck in another part of the ship, is that correct?

A. Where I could look down, right above where the men were working.

Q. Now, did you say anything to Mr. Skovgaard when he was going down there, "Watch the oil," or anything of that sort?

A. No, I did not.

Q. Because he was experienced with oil. He knew it was slippery?

Mr. Baker: I object.

Q. Let me ask this (sic) this. Was the oil slippery?

A. Yes, it's slippery.

The Court: Objection sustained.

Q. And that is pretty well known to anybody who works around in oil.

Mr. Baker: I object to asking what he knows.

By Mr. O'Neill:

Q. Well, do you give any warning to your men who work around the plant there on an oil spill, that they are to be careful?

A. Safety was a practice at the plant.

Q. Did you?

A. I, myself, did not, no, not at this particular time.

Q. What time did you have dinner aboard the ship?

A. I didn't have dinner aboard the ship.

Q. You came in at 8 o'clock, 8 o'clock in the morning.

The Court: Are we going to go through a lot of use-[fol. 569] less, unnecessary details all over again that don't help me at all? He said about a dozen times that he came aboard at 8 o'clock. I know the whole story.

By Mr. O'Neill:

Q. What time did you have—you had a break at 5 o'clock, is that it, to eat?

A. There was no special time to eat.

Q. And then when you are on a job like that you have another break around midnight, don't you?

A. Again, as I say, if there was a break, if you could find time for it; if you couldn't, you didn't take it.

Q. That's it, if you weren't busy, then you grabbed something to eat, is that it?

A. That's right. We generally send somebody uptown for it.

Q. Mr. Sexton, you said something about you found out about this leak from somebody handling soya bean oil, is that correct?

A. I presume right now it was somebody handling soya bean, it was somebody that was working on the pier.

Q. Did you make this statement, "I met the surveyor who told me that the fitting had broken on the pump"?

Mr. Baker: Just a moment. Will you identify that statement? Is it marked for identification?

Mr. O'Neill: December 6.

Mr. Baker: Is it marked for identification? Is it a different statement?

Mr. O'Neill: A different statement.

Mr. Baker: Different than you referred to before. Can you tell us by whom it was taken?

Mr. O'Neill: Mr. Clabault.

The Clerk: Statement dated December 8 to be marked [fol. 570] Respondent's Exhibit 12 for identification.

[Marked Exhibit R-12 for identification.]

Mr. Cunningham: That was taken by Mr. Clabault.

By Mr. O'Neill:

Q. Do you recall that on December 8 you said it was the surveyor told you?

A. I don't recall saying that.

Q. Well, you read this statement before you signed it, didn't you?

A. If I signed it, I said it.

Q. Your initials there on that correction, right here [indicating]?

A. They are my initials, yes.

Q. Well, now, does that refresh your recollection as to whether or not a surveyor told you?

A. No, it does not.

Q. Did you on December 8 make the statement that

after you had repaired this fitting and got the pump operating "we intended to scrape up the oil that had spilled and dump it back in the tank"?

A. I don't recall saying that, because that wouldn't be the procedure. Again, if I signed it I said it. I was very nervous at the time this statement was taken, a few days after the accident. Where did I say that? That's my signature on there.

Q. Now, when you were up on the deck of the ship who did you see down in the hold, No. 3 hold there, just before the accident?

A. Just before the accident there was Donohue, Russo and Skovgaard.

Q. That's all?

A. That's all I recall seeing.

Q. You saw nobody else down there?

A. No, sir.

Q. You saw nobody down there scraping up the oil, did you?

A. Not that I recall, no.

Q. And you were looking right down, you could see everything in the hold at that time?

A. I could see—I was interested only in the pump and the men that were there. If there were others there, I [fol. 571] don't recall seeing them.

Q. Did you make any formal report on this—did you make any report to anybody on this in the company?

A. I gave my superintendent, Mr. Blaney, a report. We all did, at the same time.

Q. You didn't make any report to the police, did you?

A. No, I did not.

Q. Now, did you go home after this accident or did you stay on the job?

A. I went home after the accident.

Q. About how far from the ship is your office?

A. Well, the length of this courtroom, from the gangway of this ship to the office.

Q. You mean it is not so far that if somebody shouted from the ship, "Get an ambulance," you couldn't hear it?

A. Maybe——

The Court: Well, there are several factors which——

A. [continuing] They would have to holler good and loud.

The Court: Wait a minute, please.
—which way the wind is blowing, if there was a wind.
Mr. O'Neill: That is all, sir.

Cross examination.

By Mr. Baker:

Q. Now, after the accident did you return to the vessel?
A. As far as the top of the gangway, that is all.
Q. But you never went onto the vessel itself, other than what you just said?
A. Never.
Q. And did you quit after that, as far as working for El Dorado, for that night?
A. For that particular night, yes.
Q. And do you know whether the rest of the El Dorado men, after this accident, also quit at that time, the men who were working?
A. From what I found out the following Monday, when [fol. 572] I went in, the plant was shut down, everybody was sent home.
Q. Now, could you tell us how many cluster lights were in that hold?
A. To my knowledge, there was one drop light.
Q. Do you know where it was located?
A. I couldn't point out the exact spot. It was close to the pump, I imagine.
Q. During the time that you had this discussion with the—I think you said it was a heated discussion—with the Mate, was anything said by him or by you concerning putting sand or sawdust on the oil?
A. Not to my knowledge, no.
Q. Were you here when he testified that he told you to put sand and sawdust on the oil?
A. No, I was not. I was called in Tuesday afternoon—or Monday afternoon, and I believe that was in the morning.

MICROCARD
TRADE MARK ®
microcard
MATTHEW BENDER & COMPANY
MB
-58
3552

Q. And this conversation took place—how long was it before Mr. Skovgaard had his accident?

A. Shortly before, 10 or 15 minutes.

Q. Well, I mean this conversation with the Mate, not before he came on board, before the accident itself.

A. Before the accident, 10 or 15 minutes.

Q. What time was it about that you had this conversation, do you recall?

A. About one o'clock.

Q. What?

A. About one o'clock in the morning.

Q. With the Mate?

A. With the Mate.

Q. I thought you said before—I am trying to get the recollection of it—I thought you said it was around midnight, or a little after midnight.

Mr. O'Neill: I object to the suggestion.

The Court: Well, I have my own notion about lawyers who are always asking about what time this happened, [fol. 573] what time that happened, what time this happened—as if a witness stands there looking at a clock and making notes, "in case I am asked now just when this happened, just when that happened." We all know within what period this happened. And if one thing is established, it is what time Mr. Skovgaard came on board. That's definite, isn't it?

If you don't know, just say you don't know. Don't let them pin you down on time.

[Discussion off the record.]

Mr. Baker: I will withdraw the question.

I just have, I think, one or two more questions.

Q. When there is an oil spill, such as there was on this vessel, as has been described, whose duty is it to place the sawdust or sand on that oil spill?

A. We never had an oil spill similar to this.

Q. Whenever there is oil about the vessel, and so forth.

Mr. O'Neill: He said he never had one.

The Court: He never had one like this, so the inference is that he doesn't know. Is that right?

The Witness: That's right.

The Court: If you had had an incident like this before, and something was done about it, you would tell us what happened.

The Witness: That's right.

The Court: Never had an incident like this.

By Mr. Baker:

Q. All right. In other instances, where there is oil, not from a spill, but from oil from pumps, and so forth, about the deck, whose job has it been, from your understanding and practice, to clean that oil from the deck or place sand or sawdust there?

[fol. 574] A. The ship's crew always did it.

The Court: Does he have to know that? I know that, too. I have been on enough ships to see who cleans an oil spill when it is on the deck. Do you have to be an expert to answer a question like that? You certainly don't expect the passengers to get down and clean it. The members of the crew clean it.

Don't get me wrong. I don't mean in an operation like this. I am talking about ordinarily. Anything that is on a ship that is hazardous is taken care of by the members of the crew, generally.

Cross examination [Continued].

By Mr. O'Neill:

Q. How long does it take this oil to congeal that we have been talking about?

A. I don't know how long it—I am told, and according to the books, at 70 degrees it congeals. How long it takes to chill down to 70 degrees, I don't know.

Q. And what was the temperature this night, have you any idea?

A. All I can say is the temperature at the time that I took it, the oil at that time was about 130 degrees.

Q. And I mean the outside temperature.

A. I don't recall.

Q. Well, did you have to have a jacket on?

A. That I don't recall.

Q. But once the oil congeals the only way you can clean it up is to scrape it, isn't that right?

A. That's right.

Q. And that requires a special instrument, some sort of a scraper?

A. Well, an ordinary shovel could be used.

Q. And these men that you have, it is intended before they finish with this ship they are going down into the tank, the bottom of the tank where the oil is, and squeegee that up, isn't that correct?

[fol. 575] A. That's right.

Q. So that the men you have there intend at some time in the course of the operation to—they have to finish the operation and get into the oil to clean it up.

Mr. Baker: I object.

A. The oil, yes.

Mr. O'Neill: That's all.

Cross examination [Continued].

By Mr. Baker:

Q. When you say about squeegeeing the oil around the pump, what does that squeegee do, could you tell us?

A. It pushes all the excess oil away, the same as you wash a window, pull the water off. The same type squeegee, only larger.

Mr. Baker: That's what it does. That's all.

Redirect examination.

By Mr. Cunningham:

Q. Do you recall, Mr. Sexton, that you told Mr. Clabault, who took that statement marked Respondent's Exhibit 12 for identification, when you spoke about the Mate having the conversation with you, do you recall telling Mr. Clabault, "He"—meaning the Mate—"did not tell me to clean up the oil or to spread sand or sawdust before sending men into the hold," do you remember telling Mr. Clabault that?

A. I don't remember it, but if it is in the statement, I said it.

Mr. Cunningham: Now, I would like to offer the statement which the respondent marked Exhibit 12 for identification into evidence, in order to support the testimony of Mr. Sexton that it is not a recent fabrication concerning his testimony with the Mate.

The Mate testified that he told Mr. Sexton, where, as a matter of fact——

The Court: But what is in there conforms exactly to [fol. 576] what this man testified to on the stand.

Mr. Cunningham: That's right. The question is at the time he made this statement he had no motive at all. And, in accordance with the law, since the Mate has testified that he told Mr. Sexton to put sand or sawdust down, this is evidence that before—shortly after the accident Mr. Sexton said that the Mate never told him to put sand or sawdust down before sending men into the hold. That is the reason for the offer.

The Court: I noticed this thing that somebody handed me this morning. Who has assailed this man's testimony as a fabrication?

Mr. Cunningham: I beg pardon, sir?

The Court: Who has assailed his testimony as a fabrication?

Mr. Cunningham: The Chief Officer has testified that——

The Court: That's a mere contradiction, which happens in trials all the time. That is not the kind of a situation that is encompassed by this rule of Jones on Evidence.

Mr. Cunningham: Well, if your Honor feels——

The Court: I certainly do.

Mr. Cunningham: —that the testimony has not been assailed as a recent fabrication, I will withdraw the offer.

The Court: Yes, it is the usual thing that you have, conflicting testimony about what one says and what another says. It is different if you go after a witness and try to make it appear that there was some improper motive on somebody's part in changing or something like that. But here it is just a question of whether that man is telling the truth or whether this man is. A question of veracity and credibility, that's all.

[fol. 577] Mr. Cunningham: I have no further questions.

Mr. O'Neill: I think this witness has the perfect answer. He just says, "If it is there, I said it."

The Court: Is everybody through with Mr. Sexton? I guess that's all, Mr. Sexton.

COLLOQUY

Mr. Cunningham: Now, there is a stipulation I would like to put on the record——

The Court: Let's see. Does that complete all of the testimony?

Mr. Cunningham: That completes my side of the case, except for a stipulation concerning the Longshoremen and Harbor Workers Compensation Act. Mr. O'Neill tells me he is going to object to the stipulation on the ground of irrelevancy. However, he has no objection to my putting the stipulation on the record to the effect that we have complied with the Longshoremen and Harbor Workers Compensation Act—paid premiums.

However, Mr. O'Neill wants it clearly on the record that we did not pay any compensation under that Act since the compensation was paid under the New Jersey Compensation Act.

The Court: Jersey law.

Mr. Cunningham: That's right. But there is a stipulation—Mr. Baker and Mr. O'Neill will stipulate that we did pay premiums to an insurance company for the Longshoremen and Harbor Workers Act. Whether or not it is relevant is another problem.

Mr. O'Neill: I say this, sir. There isn't any question about this, and it has been read into the record, that no matter how much insurance they had this particular case was under the Jersey Act and the Commissioner in Jersey [fol. 578] made a particular finding, saying that this was in the twilight zone and he didn't think this man was a ship worker in the sense to put him under the Harbor Workers Compensation Act, so he put him under the State Act of New Jersey.

The Court: And that wasn't taken up, was it?

Mr. O'Neill: No, it wasn't.

Mr. Cunningham: It wasn't tested.

Mr. O'Neill: I say this. Now, they may have 10 different kinds of insurance, but I don't see how that is relevant here. The only kind of insurance that is relevant is that they were covered under the Act under which the man—the widow elected to take.

Now, they probably have third-party liability, they probably have everything. So I don't see why we should put all the insurance policies in.

Mr. Cunningham: Well, I am not putting the policies in, just the stipulation that we complied. Your Honor knows better than anyone the Supreme Court's predilection for stating things which you don't expect them to state.

The Court: No more than absolutely necessary to determine an issue.

Mr. Cunningham: I understand that the Supreme Court intends to decide the Palazolla case on Monday—that's rumor—and I don't know what is going to be in the Palazolla opinion. And in order to protect my client I want it clear in the record in this case that we did comply with the Longshoremen's Act, whether or not compensation was paid under it.

So the relevancy of that, I don't know what the Supreme Court is going to do.

[fol. 579] Mr. O'Neill: I don't see how that could become relevant, sir, unless this case went back again and there was an appeal from the Commissioner's ruling and the Commission said, "All right, we will send it under the Federal Act."

The Court: Well, he just wants to put it in. The question of relevancy will be for me to determine.

Mr. Cunningham: After all, the Supreme Court may say that all those people who have complied with the Longshoremen and Harbor Workers Compensation Act are protected even though no payment was made under it. I don't know.

Mr. O'Neill: If they say that you and I will be down there.

Mr. Cunningham: How can I predict what they are going to do?

Mr. Baker: I would like to make my position clear for the libelant that insofar as the question of compensation

[fol. 604] EXHIBIT L-1

Certificate of Marriage

Church of

_____

_____

This is to Certify

That Carl Skovgard

and Olga Knudson,

were lawfully Married

on the 9 day of May 1936

Ukrainian

According to the Greek Rite of the Catholic Church

and in conformity with the laws of the State of

N. Y., Rev. A. Lotowych

officiating, in the presence of A. Balko

and J. Killiba Witnesses, as appears

from the Marriage Register of this Church.

Dated Dec. 11, 1935

Rev. V. Chudniowsky
Pastor

NO. 1016 - REGULSKI-POLASKI, INC. - NEW YORK, N. Y.

[fol. 605] EXHIBIT L-2

BIRTH CERTIFICATE OF CAROLYNN SKOVGAARD

B.H. 810-52 **No. 7320**

Board of Health and Vital Statistics

OF HUDSON COUNTY, N. J.

COURT HOUSE, JERSEY CITY 6, N. J.

JOHN J. MACKIN, M. D. — PRESIDENT
EDWARD W. GREENE — CLERK OF BOARD
BEN M. HORWECH — REGISTRAR OF VITAL STATISTICS

Extract of Birth Recording

Issued at Jersey City, N. J., December 12th, 1952.

THIS IS TO CERTIFY THAT:—

Carolynn Skovgaard

was born on the 21st. day of July

in the year 1942 at Jersey City, N. J.

according to the records of this office under

Ind. No. 45250 Volume No. C

Father Carl Skovgaard
Mother Olga Knudsen

Signature of certifying clerk:—

Wm O'Connor

IMPORTANT

This certificate is invalid unless bearing the personal signature of the certifying clerk under the Seal of this office.

[fol. 606]

B.H. 810-52

EXHIBIT L-2

No. 7321

BIRTH CERTIFICATE OF CHRISTINE S. SKOVGAARD

Board of Health and Vital Statistics

OF HUDSON COUNTY, N. J.

COURT HOUSE, JERSEY CITY 6, N. J.

JOHN J. MACKIN, M. D. — PRESIDENT

EDWARD W. GREENE — CLERK OF BOARD

BEN M. HORWECH — REGISTRAR OF VITAL STATISTICS

Extract of Birth Recording

Issued at Jersey City, N. J., December 12th *1952.*

THIS IS TO CERTIFY THAT:—

Christine S. Skovgaard

was born on the 12th. day of May

in the year 1951 at Jersey City, N.J.

according to the records of this office under

Index No. 142885 Volume No. C

Father Carl Skovgaard

Mother Olga Knudsen

Signature of certifying clerk:—

Wm O'Connor

IMPORTANT

This certificate is invalid unless bearing the personal signature of the certifying clerk under the Seal of this office.

BIRTH CERTIFICATE OF MARY E. SKOVGAARD

B.H. 810-52 **No. 7322**

Board of Health and Vital Statistics

OF HUDSON COUNTY, N. J.

COURT HOUSE, JERSEY CITY 6, N. J.

JOHN J. MACKIN, M. D. — PRESIDENT
EDWARD W. GREENE — CLERK OF BOARD
BEN M. HORWECH — REGISTRAR OF VITAL STATISTICS

Extract of Birth Recording

Issued at Jersey City, N. J., December 12th, *1952.*

THIS IS TO CERTIFY THAT:—

Mary Elizabeth Skovgaard

was born on the 11th. day of June

in the year 1939 at Jersey City, N.J.

according to the records of this office under

Index No. 18990 Volume No. C

Father Carl Skovgaard

Mother Olga Knudsen

Signature of certifying clerk:—

Wm O'Connor

IMPORTANT

This certificate is invalid unless bearing the personal signature of the certifying clerk under the Seal of this office.

CERTIFICATE APPOINTING OLGA SKOVGAARD ADMINISTRATRIX

NOV 3 1953

EXHIBIT NO L-3

STATE OF NEW JERSEY }
COUNTY OF HUDSON } SS.

I, LEWIS G. HANSEN,

Surrogate of the County of Hudson,

do certify that on the 13th day of August

in the year of our Lord one thousand nine hundred and fifty-three

Administration of the goods and chattels rights, and credits which were of

Carl E. Skovgaard

late of the County of Hudson, who died intestate was granted by

me to Olga Skovgaard of the County of Hudson

who is duly authorized to administer the same agreeably to law.

I further certify that said letters have not been revoked and are still in full force and effect.

Witness my hand and seal of Office the thirteenth day of August

in the year of our Lord, One thousand nine hundred and fifty-three

Lewis G. Hansen

Surrogate

By: John A. Meister

Deputy.

State of New Jersey, ss. EXHIBIT L-3

County of Hudson

CERTIFICATE APPOINTING OLGA SKOVGAARD ADMR. AD PROS.

I, LEWIS G. HANSEN, Surrogate of the County of Hudson, do certify that on the 28th *day of* July *in the year of our Lord one thousand nine hundred and* fifty-three

Administration ad prosequendum upon the estate of Carl E. Skovgaard *late of the County of Hudson, who died intestate was granted by*

me to Olga Skovgaard *of the County of Hudson, for the purpose of enabling* her *to prosecute an alleged claim against* the proper defendant *. These letters of Administration, however, do not authorize the said administrat rix to receive any moneys in settlement of any claim, either before or after suit or to receive any assets of said estate such claim, moneys or assets to be paid to a general administrator when appointed.*

Witness, *my hand and seal of Office, the* 28th *day of* July *in the year of our Lord, one thousand nine hundred and* fifty-three

Lewis G. Hansen
Surrogate.

By: John Z. Menter
Deputy

Sur. 204

[fol. 610]

EXHIBIT L-4

TAX WITHHOLDING STATEMENTS—1952

Form W-2
U.S. Treasury Department
Internal Revenue Service
APP. B. I. R. 1157-51

WITHHOLDING STATEMENT—1952
Wages Paid and Income and F.I.C.A. Taxes Withheld

ORIGINAL
Do Not Lose This Statement

U.S. DISTRICT COURT
FOR DISTRICT OF NEW JERSEY

EMPLOYEE TO WHOM PAID (Print full name, address, and Soc. Sec. No.)

Carl Skovgaard
85 Bostwick Ave.
Jersey City N.J.
S.S.151-10-1252

EXHIBIT NO L-4

FEDERAL INSURANCE CONTRIBUTIONS ACT		INFORMATION FOR INCOME TAX RETURN	
Total F.I.C.A. Wages (before payroll deductions) paid in 1952 *	F.I.C.A. employee tax withheld, if any	Total Wages (before payroll deductions) paid in 1952	Federal Income Tax Withheld, if any
		764.96	00

EMPLOYER BY WHOM PAID (Name, address, and S. S. Identification No.)

NASH, INC.
316 BARROW STREET
JERSEY CITY, NEW JERSEY 22-1422414

NOTICE TO EMPLOYEE

This statement is important! It must be attached to your U. S. income tax return for 1952.

SEE OTHER SIDE

*If your wages were subject to F.I.C.A. taxes, but are not shown, your F.I.C.A. wages are the same as wages shown under "INFORMATION FOR INCOME TAX RETURN." but not more than $3.600.

TO EMPLOYEE: BEFORE FILING WITH COLLECTOR DETACH THIS ORIGINAL AND KEEP DUPLICATE FOR YOUR RECORDS

Form W-2
U. S. Treasury Department
Internal Revenue Service

WITHHOLDING STATEMENT—1952
Wages Paid and Income and F.I.C.A. Taxes Withheld

ORIGINAL
Do Not Lose This Statement

MARITAL STATUS
S—SINGLE
M—MARRIED

EMPLOYEE TO WHOM PAID (Print name, full address, and Social Security account number)

Carl E. Skovgaard
85 Bostwick Ave
Jersey City N. J.

151-10-1252

M

FEDERAL INSURANCE CONTRIBUTIONS ACT		INFORMATION FOR INCOME TAX RETURN	
Total F.I.C.A. wages (before payroll deductions) paid in 1952*	F.I.C.A. employee tax withheld, if any	Total wages (before payroll deductions) paid in 1952	Federal income tax withheld, if any
		5452.99	308.63

EMPLOYER BY WHOM PAID (Name, address, and identification number)

EL DORADO OIL WORKS
311 CALIFORNIA STREET
SAN FRANCISCO 4, CALIFORNIA
94-0452360

NOTICE TO EMPLOYEE: This statement is important. It must be attached to your U.S. income tax return for 1952. SEE OTHER SIDE.

*If your wages were subject to F.I.C.A. taxes, but are not shown, your F.I.C.A. wages are the same as wages shown under "INFORMATION FOR INCOME TAX RETURN," but not more than $3,600.

DETACH ORIGINAL COPY HERE BEFORE SENDING TO COLLECTOR OF INTERNAL REVENUE

Form W-2
U. S. Treasury Department
Internal Revenue Service

WITHHOLDING STATEMENT—1952
Wages Paid and Income and F. I. C. A. Taxes Withheld

ORIGINAL
Do Not Lose This Statement

EMPLOYEE TO WHOM PAID (Print name, full address, and Social Security account number)

Carl Skovgaard
85 Bostwick Avenue
Jersey City, New Jersey
151-10-1252

FEDERAL INSURANCE CONTRIBUTIONS ACT		INFORMATION FOR INCOME TAX RETURN	
Total F.I.C.A. wages (before payroll deductions) paid in 1952*	F.I.C.A. employee tax withheld, if any	Total wages (before payroll deductions) paid in 1952	Federal income tax withheld, if any
$ 50.00	$ .75	$ 50.00	$ none

EMPLOYER BY WHOM PAID (Name, address, and identification number)

WILLIAM H. FLINN
775 WEST SIDE AVE.
JERSEY CITY, N. J. 22-0915710

NOTICE TO EMPLOYEE: This statement is important. It must be attached to your U. S. income tax return for 1952. SEE OTHER SIDE.

*If your wages were subject to F.I.C.A. taxes, but are not shown, your F.I.C.A. wages are the same as wages shown under "INFORMATION FOR INCOME TAX RETURN," but not more than $3,600.

[fol. 611] EXHIBIT L-5 AND EXHIBIT L-6

TAX WITHHOLDING STATEMENTS [YEARS 1950 AND 1951]

Form W-2 (Rev. July 1951)
U. S. Treasury Department
Internal Revenue Service

WITHHOLDING STATEMENT—1951
Wages Paid and Income and F. I. C. A. Taxes Withheld

EMPLOYEE'S COPY (DUPLICATE)

FEDERAL INSURANCE CONTRIBUTIONS ACT		INFORMATION FOR INCOME TAX RETURN		MARRIED	SINGLE	
Total F. I. C. A. wages (before payroll deductions) paid in 1951*	F.I.C.A. employee tax withheld, if any	Total wages (before payroll deductions) paid in 1951	Federal income tax withheld, if any			
$3600.00	$54.00	$5169.99	$215.40	X		

EMPLOYEE TO WHOM PAID (Print name, full address, and Social Security account number)

Carl E. Skovgaard
85 Bostwick Ave
Jersey City, N.J.
151-10-1252

U. S. DISTRICT COURT
FOR NEW JERSEY
NOV 3 1953
EXHIBIT NO. L-5

EMPLOYER BY WHOM PAID (Name, address, and identification number)

EL DORADO OIL WORKS
311 CALIFORNIA STREET
SAN FRANCISCO 4, CALIFORNIA
94-0452360

KEEP THIS COPY FOR YOUR OWN RECORD

*If your wages were subject to F. I. C. A. taxes, but are not shown, your F. I. C. A. wages are the same as wages shown under "INFORMATION FOR INCOME TAX RETURN," but not more than $3,600.

Form W-2
U. S. Treasury Department
Internal Revenue Service

WITHHOLDING STATEMENT—1950
Wages Paid and Income Tax Withheld

EMPLOYEE'S COPY (DUPLICATE)

Total wages (before pay-roll deductions) paid in 1950	Federal income tax withheld, if any	Married	Single
$4,912.88	$211.10		

EMPLOYEE TO WHOM PAID (Print name, full address, and Social Security Number)

Carl Skovgaard
85 Bostwick Avenue
Jersey City, N. J.
151-10-1252

U. S. DISTRICT COURT
FOR NEW JERSEY
NOV 3 1953
EXHIBIT NO. L-6

EMPLOYER BY WHOM PAID (Name, address, and Social Security Identification Number)

EL DORADO OIL WORKS
311 CALIFORNIA STREET
SAN FRANCISCO 4, CALIFORNIA
94-0452360

KEEP THIS COPY FOR YOUR OWN RECORD

REMOVE ORIGINAL COPY HERE BEFORE SENDING TO COLLECTOR OF INTERNAL REVENUE

EXHIBIT L-7

547

DEATH CERTIFICATE OF CARL SKOVGAARD

B. H. 443

HUDSON COUNTY

Bureau of Vital Statistics

COURT HOUSE, JERSEY CITY 6, N. J.

No. 15860

FACSIMILE OF RECORD OF DEATH

COUNTY FILE No. ----- ISSUED Dec. 8th 195 2

1. PLACE OF DEATH a. COUNTY: Hudson	2. USUAL RESIDENCE a. STATE: NJ b. Hudson
b. CITY OR BOROUGH: Bayonne c. LENGTH OF STAY:	c. CITY OR BOROUGH: Jersey City
d. FULL NAME OF HOSPITAL OR INSTITUTION: ~~Aboard SS Tungus~~ Eldorado Oil Co.	d. STREET ADDRESS: 85 Bostwick Ave.

3 NAME OF DECEASED: Carl Edward Skovgaard					4. DATE OF DEATH: Dec. 6th, 1952			
5. SEX: Male	6. COLOR OR RACE: white	7. MARRIED, NEVER MARRIED, DIVORCED: ~~Married~~	8. DATE OF BIRTH: 9-25-09	9. AGE (years): 43	Months: 2	Days: 11	Hours:	Min.:

10a. USUAL OCCUPATION: Foreman , Maintenance,	10b. KIND OF BUSINESS OR INDUSTRY: Oil	11. BIRTHPLACE: Denmark	12. CITIZEN OF WHAT COUNTRY: USA
13. FATHER'S NAME: John Skovgaard		14. MOTHER'S MAIDEN NAME: Eliz. Bauer	
15. WAS DECEASED EVER IN U.S. ARMED FORCES? --	16. SOCIAL SECURITY NO. --	17. INFORMANT: Mrs. Olga Skovgaard	

18 CAUSE OF DEATH — MEDICAL CERTIFICATION

		INTERVAL BETWEEN ONSET AND DEATH
I. DISEASE OR CONDITION DIRECTLY LEADING TO DEATH*(a)	Suffocation and shock	
ANTECEDENT CAUSES DUE TO (b)	following submersion in oil	
DUE TO (c)		
II. OTHER SIGNIFICANT CONDITIONS		

19a. DATE OF OPERATION	19b. MAJOR FINDINGS OF OPERATION	20. AUTOPSY? Yes ☐ No ☒

21a. ACCIDENT SUICIDE HOMICIDE: Accident	21b. PLACE OF INJURY: Ship	21c. (City, Borough, or Township) (COUNTY) (STATE): Bayonne Hudson NJ	
21d. TIME OF INJURY: 12-6-52 m.	21e. INJURY OCCURRED While at Work ☐ Not While at Work ☐	21f. HOW DID INJURY OCCUR? Fell into oil tank	

22. I hereby certify that I attended the deceased from ..... 19....., to ..... 19....., that I last saw the deceased alive on ....., 19 ....., and that death occurred at ..... m., from the causes and on the date stated above.

22a. COUNTY PHYSICIAN'S CERTIFICATION:

I hereby certify that I have investigated the circumstances attending this death, and that death occurred at ..... m., in my opinion, from the causes and on the date stated above.

23a. SIGNATURE: Thomas S. Brady MD	23b. ADDRESS: Dep. Co. Physician	23c. DATE SIGNED: 12-8-52

24a. BURIAL, CREMATION, REMOVAL: Burial	24b. DATE: 12-9-52	24c. NAME OF CEMETERY OR CREMATORY: Holy Cross	24d. LOCATION: No. Arlington NJ

DATE REC'D BY LOCAL REG. 12-8-52	REGISTRAR'S SIGNATURE: Ben M. Horwech	25. FUNERAL DIRECTOR: Wm. Schlemm	N. J. License No.	ADDRESS: Union City NJ

I, ... Registrar, do hereby certify that the above is a true and correct facsimile of an original record of death filed at this office according to law on 12-8-52 ....., 19....

..... CLERK'S SIGNATURE

..... REGISTRAR OF VITAL STATISTICS.

EXHIBIT L-7

DEATH CERTIFICATE OF CARL SKOVGAARD

IMPORTANT— UNAUTHORIZED ALTERATION OR CORRECTION OF THIS CERTIFICATE RENDERS IT INVALID FOR ANY PURPOSE —IMPORTANT

If errors are noted return Certificate to issuing office with FULL EXPLANATION.

PENALTY FOR FALSE STATEMENT FIVE HUNDRED ($500.00) DOLLARS

State Bureau of Vital Statistics, Trenton, New Jersey

The undersigned requests that the following corrections or additions be made to the original certificate

of Death of _____

who Died on _____ in _____

NAMES OF ITEMS IN ERROR	FROM	TO

Signature of Witness _____ Signature _____

Address _____ Address _____

Date _____ City and State _____

CORRECTION AND/OR AFFIDAVIT SHOWN ABOVE IS A LEGAL PART OF THIS RECORD

Registrar of Vital Statistics

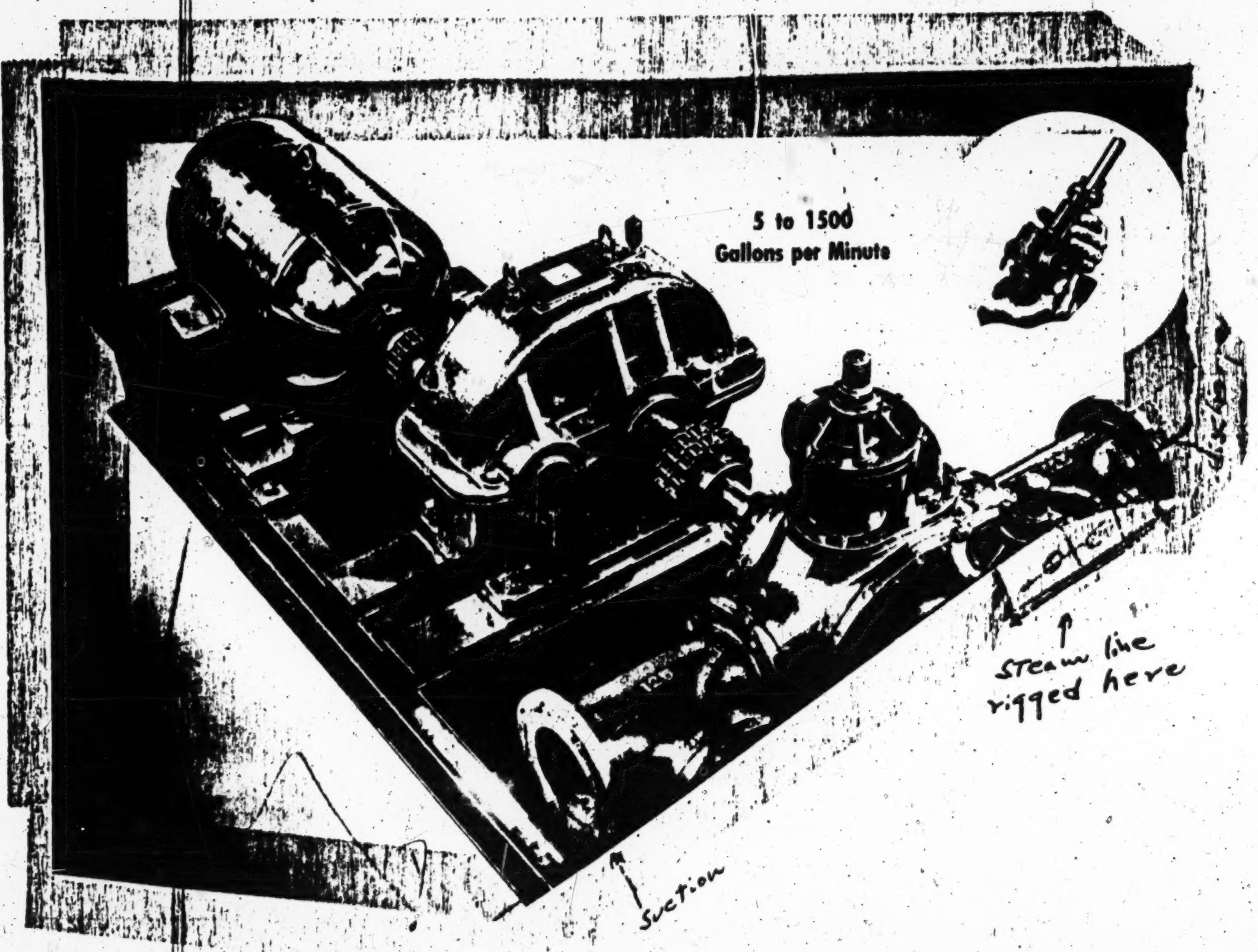
U. S. DISTRICT COURT
FOR NEW JERSEY
NOV 3 1953
EXHIBIT NO

[fol. 614]

EXHIBIT L-8

PICTURE OF PUMP

U. S. DISTRICT COURT
FOR NEW JERSEY
NOV 3 1955
EXHIBIT NO. L-8



(This pump is similar to one in question, with some embellishments).

550
[fol. 615]

EXHIBIT R-1

STATEMENT OF SALVATORE RUSSO

TUNGUS CARL SKOVGAARD

DEATH IN NOV. 6, 1952.

MY NAME IS SALVADORIE RUSSO AND I LIVE AT 588 BOULEVARD, BAYONNIE, N.J. I HAVE BEEN EMPLOYED AS MECHANIC'S HELPER BY EL DORADO OIL CO. FROM ABOUT NOV. 15, 1952 TO DATE.

I RECALL CARL SKOVGAARD WHO WAS MAINT. FOREMAN AT EL DORADO CO. ON OR ABOUT DEC. 6, 1952 AT ABOUT 1215 AM. I WAS ASSISTING IN REMOVING A BROKEN CONNECTION WHERE THE STEAM HOSE JOINED THE OIL DISCHARGE LINE. DONAHUE WAS WITH ME. THE OIL IN WORKING SPACE ON THE TANK TOP WAS SQUEEGED AROUND THE PUMP. WHILE WE WERE REMOVING THE PUMP THE THREE MATES CAME INTO SHELTER DECK BUT DID NOT SAY ANYTHING ABOUT PUTTING SAND OR SAWDUST IN THE OIL.

AFTER WE HAD REMOVED THE GASKET WE WERE TRYING TO START THE PUMP. I RECALL THAT THERE WERE TWO SPARKS WERE ON THE LINE BETWEEN THE PUMP AND STARBOARD TANK COMBING. SKOVGAARD

SKOVGAARD WHO REMOVED AFTER WE HAD REMOVED THE PIPE WAS STANDING ON THE SHELTER DECK AT WATER PORT BANKER. THE OIL THAT HAD LEAKED OUT DUE TO THE BROKEN PIPE WAS ON FORWARD END OF TANK TOP AND ON SHELTER DECK FORWARD OF TANK COMBING. SKOVGAARD WALKED AROUND THE OUTER SIDE OF PORT TANK COMBING AND STEPPED UPON THE COAMING AS HE WAS STEPPING FROM THE COAM TO THE TANK COVER HE SLIPPED ONE FOOT ON THE COVER WHEN HE SLIPPED FELL. THE OIL

[fol. 616]

EXHIBIT R-1

STATEMENT OF SALVATORE RUSSO

THAT CAME OUT OF PUMP DURING REPAIRS I WIPED UP WITH RAGS. IT IS POSSIBLE THERE MIGHT HAVE BEEN A SLIGHT OIL SLICK ON THE TANK COVER AT THIS POINT BUT NO OIL FROM ORIGIONAL LEAK HAD SPREAD OVER THIS POINT. ANY OIL IF ANY IN THIS SECTION WOULD BE WHAT LEAKED OUT OF PUMP AND NOT DUE TO OIL SPILL.

IN FALLING HE REACHED OUT AND ~~GRABBED~~ GRASPED A BUCKET AND I TRIED TO GRAB HIM BUT HE FELL DOWN INTO THE TANK. I WENT DOWN IN TANK AND RECOVERED HIS BODY IN ABOUT 6 FEET OF OIL.

Salvatore Russo
December 8, 1952

STATEMENT TAKEN AT OFFICE OF EL DORADO OIL CO. AT CONSTABLE HOOK, BAYONNE DIVISION DEC. 8, 1952 BY H. CLARKULT.

HUDSON COUNTY

BOARD of HEALTH

AND

VITAL STATISTICS

COURT HOUSE

JERSEY CITY 6, N. J.

Facsimile of Death Record

of

NOTICE

Do Not Deface This Certificate

Alterations, corrections or additions to this certificate may be made *only* at this office; under its official seal, after proper forms have been executed, and proof for the changes submitted.

N. B. Any other erasures; insertion of additions or corrections on this certificate invalidates it for any purpose.

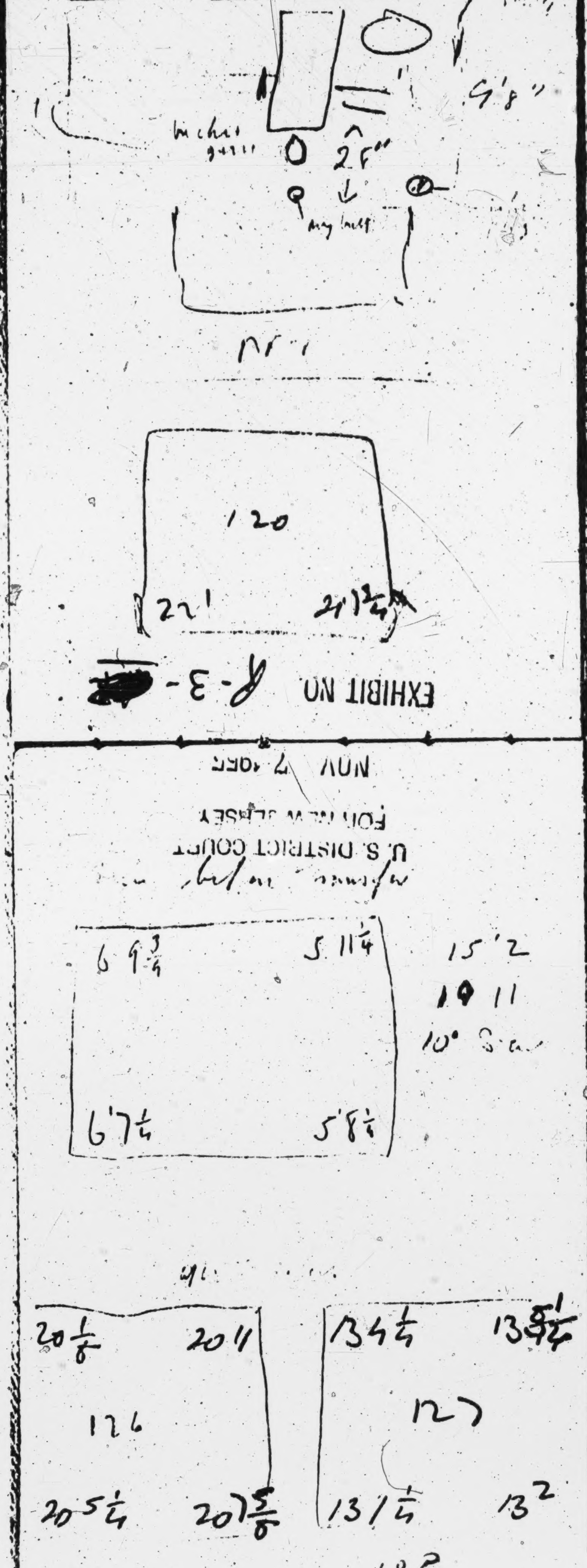
If facts as stated are incorrect or disputed for any reason, return certificate to the issuing office.

Registrar.

EXHIBIT R-3

[fol. 617]

MEMORANDUM [DRAWING] PREPARED BY WIT. MALLETT IN REGULAR COURSE OF BUSINESS



Memorandum [drawing] prepared by Wit. Mallett in regular course of ~~bucess~~ business

U. S. DISTRICT COURT
FOR NEW JERSEY
NOV 7 1955
EXHIBIT NO. R-4

REPORT FROM SURVEYORS AND INSPECTORS OF CARGOES

TO WHOM IT MAY CONCERN

COCOANUT OIL M/S "TUNGUS" - - - - NOVEMBER, 1952.

THIS IS TO CERTIFY that the undersigned, under instructions from Messrs. Barber Steamship Lines, Inc., 17 Battery Place, New York 4, New York, did on December 5th and 6th, 1952 proceed to the M/S "TUNGUS" lying along-side Pier 3 Constable Hook, Bayonne, New Jersey, in order to ullage, sample and take temperatures of bulk Cocoanut Oil carried in the port deep tank situated in No. 3 hold, examine tank tops, tank lids and manhole covers and available bulkheads, etc., also to attend the transfer for the purpose of trimming the vessel of Cocoanut Oil from the starboard deep tank to the empty port deep tank upon completion of pumping, note general conditions and have to report as follows:

Examination was made, ullages and temperatures taken and samples drawn in company with Mr. F. Mossella of Dr. C. V. Bacon's office, representing Underwriters and/or Consignees.

The M/S "TUNGUS" loaded bulk Cocoanut Oil at Cebu on October 12, 1952; loading particulars as follows:

PORT DEEP TANK

67-3/4" 66-1/4"
TEMPERATURES:
TOP 112° F.
MIDDLE 111° F.
BOTTOM 108° F.
66-1/2" 65-1/2"

STARBOARD DEEP TANK

62-1/4" 64-1/2"
TEMPERATURES:
TOP 124° F.
MIDDLE 120° F.
BOTTOM 112° F.
62-15/16" 61"

Draft forward 14'03" aft 15'03" List - NIL

Ullages measured from the top of the tank lid plating to the oil level.

The valves were cracked open and steam circulated through the heating coils on November 24th and the vessel arrived at New York on November 30, 1952.

Examination in No. 3 shelter deck at 6:00 PM on December 5, 1952 showed the tank tops, where visible, to be dry, the tank lids and manhole covers to be tight and the packing in good order and condition.

Ullages and temperatures were taken at 6:15 PM on December 6th, 1952 as follows:

REPORT FROM SURVEYORS AND INSPECTORS OF CARGOES

M/S "TUNGUS" - - NOVEMBER, 1952.

PORT DEEP TANK

5'10½"	5'10½"
TEMPERATURES	
TOP	119° F.
MIDDLE	118° F.
BOTTOM	117° F.
5' 6-3/4"	5'6-3/4"

STARBOARD DEEP TANK

5'4½"	5'4"
TEMPERATURES	
TOP	120° F.
MIDDLE	120° F.
BOTTOM	118° F.
5'0½"	5' 1"

Draft forward 15'01" aft 21'06" List - 1° to Port.

Ullages measured from the top of the tank lid plating to the oil level.

Samples were drawn every 12" the depth of each tank, the Cocoanut Oil appearing clean and clear.

Examination of the forward and after bulkheads of the deep tanks from No. 2 hold and from the engine room showed them to be tight and there was no evidence of oil in the steam return or observation tank.

SOUNDINGS

No. 2 bilge - port - - - - - - - - - - dry
starboard - - - - - - - - - dry

No. 3 double bottom tank - port - - - - 2" fuel oil
starboard - 2" " "

DECEMBER 5, 1952

5:30 PM - Vessel alongside Pier 3 Constable Hook

6:15 PM - Ullages and temperatures taken

6:30 PM - Port deep tank lid off; samples drawn.

8:00 PM - Commenced pumping

At approximately 12:05 AM on December 6, 1952 the 1" steam injection line into the main discharging line was noted leaking and at 12:15 AM the line broke off close to the discharging line. Oil spurted out from the hole, spraying over No. 3 shelter deck and although the pump was stopped, oil continued to flow out, back flowing from the discharging line until plugged. It was not possible to estimate the quantity of oil lost.

DECEMBER 6, 1952.

6:20 AM - Resumed pumping port deep tank

8:00 AM - Completed pumping

11:00 AM - Completed baling liquid oil from port deep tank

Examination in the port deep tank after pumping and baling had been completed showed, except for a negligible amount adhering to the tank sides and floor, all the oil to have been discharged.

M/S "TUNOUS" - - NOVEMBER, 1952.

A sample of the oil, remaining in the port deep tank, which appeared to be somewhat "mealy" was taken.

At 11:05 AM transfer of Cocoanut Oil from the starboard deep tank to the port deep tank commenced and ceased at 12:40 PM on December 6, 1952. Ullages and temperatures were taken as follows:

STARBOARD DEEP TANK. BEFORE TRANSFER OF OIL

6'9-3/4"	5'11-1/4"
TEMPERATURE: 127° F.	
6'7-1/4"	5'8-1/4"

Draft forward 15'02" aft 19'11" List 10° to Starboard

AFTERTRANSFER OF OIL

PORT DEEP TANK

20'0-1/8"	20'11"
TEMPERATURE: 126° F.	
20'5-1/4"	20'7-5/8"

STARBOARD DEEP TANK

13'4-1/4"	13'5-1/4"
TEMPERATURE: 127° F.	
13'1-1/4"	13' 2"

Draft forward 15'02" aft 19'11" List 1° to Port

After transfer of oil samples were drawn every 12" the depth of each tank, the cocoanut oil appearing clean and clear.

PORT DEEP TANK

Quantity of oil said to have been loaded - - - - - - - - - - - - - - - 1,072,924 lbs.

Quantity of oil discharged per Dr. C. V. Bacon's Office - - - - - - 1,098,732 "

Difference - - - 25,808 lbs.

Composite samples of the Cocoanut Oil drawn on the various occasions from each of the tanks are being retained in this office for future reference, if necessary.

A. H. Cook & Co.

PER:

SURVEYORS AND INSPECTORS OF CARGOES

NEW YORK

JANUARY 6, 1952.

[fol. 621]

EXHIBIT R-6

TRANSLATION OF LOG ENTRIES

102 - 330-2

PRINTED MATTER ON TOP PAGES OF LOG BOOK

YEAR MONTH DATE DAY SHIP'S POSITION:

1. Time
2. Direction of wind and force. Weather.
3. Sea, Barometer, Thermometer (5)
4. Steered course: By steering compass. By Standard compass
6. Deviation for Standard Compass
7. Leeway
8. Magnetic Course
9. Variation
10. True Course
11. Log
12. Distance run
13. SOUNDINGS: (depths, condition of bottom)
    BEARINGS (objects, distance off)
    RADIO BEARINGS. OBSERVATIONS (celestial objects, chronometer showing, height of celestial objects, index error, height of eye.
    Time Log showed

16. Remarks.

[fol. 622]

EXHIBIT R-6

TRANSLATION OF EXTRACT OF THE LOG OF THE M/S TUNGUS

Page #72

Friday, October 10, 1952 - Position of ship: Cebu.

At 0700 crew turned to. We continued painting of the side on the boat deck. At the same time we continued with varnishing the lists (rails) on the bridges and the accomodation ladder.
At 0800 continued cleaning of the deep tanks.
At 1700 finished all work for the day.

Calm, d. barometer 758, temperature 89 deg. plus.

Youngman O. Hagen and Deck Boy Jorgensen half free day.
Carpenter T. Ellefsen was strongly inebriated from breakfast on. He drank alcohol during working hours. He was talked to by the Chief Officer about this. The carpenter was, however, not at work after noon. He could not be found on board.

Saturday, October 11, 1952.

At 0700 crew turned to. We did various upkeep work and cleaned the rooms.
At 0800 a gang came on board from shore and continued cleaning of the deep tanks.
At 1700 the tanks were clean. At 1715 covers put on.

Carpenter Ellefsen, who had received orders to attend at the doctor's for further treatment of his elbow, could not be found on board.
Motorman Simonsen to doctor for further treatment of athletes foot.

Filled 144 tons of fresh water.

Sunday, October 12, 1952 - Position of ship: Cebu. Page #73

At 0530 - 1 gang from shore commenced rigging up pump and hoses for loading of coconut oil in the deep tanks.
At 0600 surveyor came on board. Tanks surveyed and approved.
At 0710 commenced [illegible]oad coconut oil in port tank. Consignee O/N [illegible]ucts Corp. In starboard tank loading coconut oil, consignee O/N Pacific Vegetable Oil Corp. We loaded alternately in the tanks as the ship's list would allow. Pump and hoses have been furnished by the shipper.
At 1825 the oil was pumped on board. Surveyors and ship's Chief Officer took the following measurements:

Port Tank: Temperatures - bottom 108°F.
mean 111°F.
top 112°F.

ullages		
67-3/4"	66-1/4"	S.T.B. 429 L/T
66.5"	65.5"	

Stbd Tank: Temperatures - bottom 112°F.
mean 120
top 124

ullages		
62-1/4"	64-1/4"	S.T.B. 429 L/T
62-15/16"	61"	

Total 958 L/T. Draft: F. 14' 3", A. 15' 3".

Herewith the cargo from Cebu is on board.

TRANSLATION OF EXTRACT OF THE LOG OF THE M/S TUNGUS

October 18, 1952 (cont'd)

Tank covers securely screwed on. The gear taken ashore. Steering engine tested and found in order.

At 1900 pilot came on board. At 1905 commenced to single up. At 1915 let go the moorings. Steering according with the pilot's directions. According with the Master's orders.
At 1950 discharged the pilot.

Sunday, November 30, 1952 - Position: Atlantic Ocean on voyage from Cristobal to New York. Page #135

0000-0400: Steering according with the Captain's orders
Steering according with the pilot's orders. Anchor watch.
At 0025 hauled the log in.
At 0135 pilot came on board. Clock 4 minutes back.
At 0242 anchored with port anchor.

0400-0800: Anchor watch.
At 0745 hove up anchor. Steering through the harbor according with the pilot's directions.

0800-1200: At 0812 tugboats fast fore and aft.
At 0825 alongside the pier.
At 0850 finished mooring at Pier 38 Atlantic Basin.
Draft: F. 18' 09", A. 20' 07", M. 19' 08".

Crew rigging booms. Otherwise kept Sabbath.
Crew firing firecrackers. We have had firecrackers as cargo in the poop hatch.

Monday, December 1, 1952 - At New York. Page #136
At 0800 commenced to discharge with 5 gangs in No. 1, 2, 3, 4 and 5.
At 0900 there was a strike. The longshoremen put on the hatches and went ashore.

A.B., W. Hungard, who today was paid off, got from the ship's Chief Officer, 2 bottles of liquor which were confiscated at Hong Kong from Youngman Hagen who tried to take same on board. Hungard insisted that it was he who owned the bottles.

Tuesday, December 2, 1952.
At 0800 continued discharging with 5 gangs in No. 1, 2, 3, 4 and 5. It is snowing somewhat and we rigged hatch tents for discharging.
From 1200-1300 - meal hour. Hatches were put on during the pause.
At 1300 we continued in the same way. We discharged drums of camphor oil from the tonnage hatch.
At 1700 finished for the day.
Draft: F. 17' 8", A. 20' 5", M. 19' 1/2".

Signed on the following crew members:
Filled 80 tons fresh water.

Wednesday, December 3, 1952. Page #137
At 0800 we continued to discharge with 4 gangs in No. 1, 2, 3 and 5.
At 0825 we commenced to discharge refrigerated cargo in No. 2 & 3.
At 0915 finished discharging refrigerated cargo in hatch No. 2.
1200-1300: meal hour. Thereupon we continued to discharge with 2 gangs.
At 1625 we commenced to discharge special cargo in the poop hatch. Watchman and 3rd Officer present during the discharge.
Remarks: From the poop hatch was discharged 1 case marked -

[fol. 624]

EXHIBIT R-6

TRANSLATION OF EXTRACT OF THE LOG OF THE M/S TUNGUS

December 3, 1952 (cont'd):

- O H L (in a diamond) - which was broken open. Same contained, when it was unpacked on the dock in the presence of the Chief Officer, 4 binoculars and 23 leather straps.

At 1700 finished work for the day.

2nd Officer Rosvik half free day.

Draft: F. 16' 1", A. 21', M. 18' 6-1/2".

Thursday, December 4, 1952.

At 0800 continued discharging with 2 gangs in hatches No. 1 and 3.
1200-1300: meal hour.
At 1445 No. 3 hatch discharged as regards New York cargo. The gang went ashore.
At 1720 finished No. 1 hatch and with this the discharge at Pier 38 was finished. Discharged there 958 L/T.

Draft: F. 15' 3", A. 21' 6".

2nd Officer Rosvik full free day. Youngman Hagen half free day.

Friday, December 5, 1952. Page #138

During the forenoon we inspected the cargo which was landed at New York in a damaged condition.
1 c/s marked - S.E.L./N.Y. - #8, stains on packing (contains binoculars.
1 ctn. porcelain marked - GBC/100/N.Y. - contained 9 cartons in order, 1 ctn. with 11 pcs. porcelain.
60 paper bags cocoanut of various marks a little damaged. 8 paper bags overfilled.
Hemp: various marks, 20 B/L stained - 4 bales in dispute.

At 1540 pilot came on board and 2 tugs alongside. At 1540 departed from Pier 38 in order to proceed to the Eldorado Oil Co. at Bayonne.

During the maneuvering alongside Pier 3 in Bayonne the ship repeatedly handed with the starboard side at No. 2 hatch against the corner of the head of the pier. The ship was then assisted by 3 tugs. It was proven that the ship had received 4 indentations in the ship's plating in the 4th strake at No. 2 starboard side.

At 1725 we were moored at Pier 3 and discharged tugs and pilot.
At 1730 surveyor came on board and we took the necessary measurements in the presence of the ship's Chief Officer.

Stbd. Tank: Ullages:

5' 4.5"	5' 4"
5' 0.5"	5' 1"

Temperatures:
B. - 118°F.
M. - 180
T. - 120

Port Tank: Ullages:

5' 10.5"	5' 10.5"
5' 6-3/4"	5' 6-3/4"

Temperatures:
B. - 117°F.
M. - 118
T. - 119

EXHIBIT R-6

TRANSLATION OF EXTRACT OF THE LOG OF THE M/S TUNGUS

December 5, 1952 (cont'd) Page #139

At 1830 the ship's crew took on board the oil company's pump and hoses. Same were placed on the port tank cover which was laid across the port tank. The gear was placed according with the pump crew's wishes and orders. Thereupon the pump crew commenced to connect the hoses and make everything ready for pumping. The inside of the hatch, shelter deck, was lit up with 4 clusters of 500 watt lamps.
At 2005 commenced to pump oil. Pumped during the night.

Saturday, December 6, 1952.

Pumping of oil from port tank continued past midnight.

At 0015 the oil connection burst where the steam pipeline is screwed on to same, becoming leaky.
The leakage was detected by the ship's 3rd Officer who was on watch. The 3rd Officer tried immediately to call men from the pump crew, but it was found that none of the pump crew was on board. Before the 3rd Officer had succeeded in getting hold of the men which were down on the dock the connection was broken off and the coconut oil gushed out into the starboard side of the shelter deck and down through the hatch covers in the forward part of the tank into the No. 3 lower hold. The pump was stopped immediately as the men came on board. The oil, however, continued to pass through the leaky place as the oil was running back through the oil hose. However, one succeeded in stopping the leakage by inserting a plug, but not before several tons of oil had run into the deck and lower hold.

The oil stained about 50 paper bags desiccated coconut bound for Boston stowed in the starboard side of the shelter deck.

The oil ran underneath mahogany lumber which was stowed in the after part of the shelter deck in No. 3. It continued through the shelter deck into No. 4 under bales of rugs which were stowed there. In the lower hold No. 3 are stowed steel plates, scrap brass metal and mahogany lumber.

Page #140.

The extent of the damage cannot be determined before a survey is held after the cargo has been discharged.

At 0125 the foreman for the pump gang, Carl Skovgaard, who was engaged in inspecting the electric pump which was placed on the tank cover, which was laid across the tank trunk, fell down into the oil in the deep tank, which then was about 8' above the bottom and 22' from the top of the tank. The reason that he fell was that he slid in the oil which had been spilled across the tank cover on account of the leakage that had been caused. The ship's Chief Officer had called attention to that one had to scatter sawdust or sand on the tank cover before work was resumed.
His assistants immediately ran down the ladder into the deep tank in order to get hold of him. The ship's watchman and the First, Second and Third Officers immediately ran to get hold of gear, as a boat hook, and rope. Ambulance and doctor were sent for and stretcher and booms were made ready in order to get the victim ashore.

TRANSLATION OF EXTRACT OF THE LOG OF THE M/S TUNGUS

December 6, 1952 (cont'd)

At 0135 they had found the lifeless body of the victim and brought him up on one of the longitudinal heavy girders in the tank. He was immediately put on the stretcher and hove ashore. He was landed on the dock at the same time as the ambulance and doctor arrived. The doctor could only pronounce him dead. After the accident the pump crew left the ship without emptying the pump or the hoses.

At 0330 a new pump gang came on board. They put the pump down in the port deep tank, 'tween deck.

At 0620 we continued to discharge oil.

From 0720 to 0730 stopped as a bearing on the pump was running hot.
0735 to 0740 stopped for the same reason.

At 0800 port deep tank was finished discharging. The pump and hoses were blown through with steam.

*stringers.

Page #141

The ship's own crew took the pump up from the port deep tank. Pump and connections were further made ready in order to shift oil from starboard deep tank into port deep tank.

At 1108 we commenced to pump oil in order to trim the ship to an even keel.

At 1300 pump brought ashore. Draft: F. 15' 0", A. 20' 0".

Stbd. Tank before trimming:

6' 9-3/4"	5' 11-1/2"
6' 7-1/2"	5' 8-1/4"

After trimming:

Port		Stbd.	
20' 1/8"	20' 11"	13' 4-1/4"	13' 5-1/4"
20' 5-1/4"	20'7-5/8"	13' 1.5"	13' 02"

We waited for tugboats and pilot in order to shift to Pier 18 Hoboken. Steering engine tested and found in order.

At 1643 Tugs "Barbara Moran" and "Marie Pat" arrived in order to assist the ship during the shifting. Pilot on board.

At 1705 let go the moorings and proceeded, assisted by the tugs from the pier.

At 1812 alongside Pier 18 in Hoboken assisted by the "Barbara Moran". At 1835 finished mooring and the pilot went ashore. Draft: F. 15' 0", A. 20' 0".

Sunday, December 7, 1952.

Keeping Sabbath. Watchman from shore all day.

Monday, December 8, 1952.

At 0800 - 2 gangs came on board and commenced to discharge steel from No. 2 and 3.

1200-1300 meal hour. Thereupon we continued as before.

At 1550 hatch No. 2 discharged. Shifted gang to No. 5 and commenced to discharge steel from this hatch.

At 1700 finished discharging for the day.

Draft: F. 13' 3", A. 20' 5".

[fol. 628] EXHIBIT R-6

TRANSLATION OF EXTRACT OF THE LOG OF THE M/S TUNGUS

Page #144

Thursday, December 11, 1958.

At 0545 Tugs "Temo" and "Venus" came alongside. Everything ready for shifting. Awaiting daylight.
At 0635 pilot came on board. At 0645 let go the moorings and shifted to Castle Island, Boston. We were assisted by the tugs out from the dock in Quincy.
At 0652 discharged the tugs.
At 0745 tugboat alongside to assist the ship to the dock. At the same time harbor pilot on board.
At 0754 moored alongside the dock.
At 0800 1 gang came on board and commenced to discharge desiccated cocconut bags from the shelter deck in No. 3. The bags on the starboard side in the shelter deck No. 3 have cecome stained on account of the accident at New York at Eldorado Oil Co.
At 0945 commenced to discharge the refrigerated cargo for Boston from the starboard refrigerated compartment No. 3.
At 1130 the refrigerated cargo was discharged and the gang made ready to discharge mahogany lumber from No. 3 lower hold.
At 1340 the longshoremen went ashore on account of heavy rain.

[fol. 627]

EXHIBIT R-6

TRANSLATION OF EXTRACT OF THE LOG OF THE M/S TUNGUS

Page #144

Tuesday, December 9, 1952.

At 0800 - 2 gangs came on board and continued to discharge steel and scrap metal barrels from No. 3 and 5.
1200-1300 - meal hour.
At 1300 continued discharge with 1 gang. The gang first finished No. 3 where we finished at 1405 and thereupon No. 5 where we finished at 1425. With this all cargo has been discharged. Altogether 590 L/T steel.
The weight as to the scrap metal is not known exactly as same was not weighed at the departure of the ship.
Draft: F. 13' 5", A. 18' 11".
At 1555 sea pilot and coast pilot came on board. Tug "Peter Moran" alongside forward in order to assist the ship from the dock.
At 1610 let go the moorings. At 1617 let go tug.
At 1623 let go the harbor pilot.
Steering according to the sea pilot's directions.
At 1800 discharged the sea pilot and set the log.
At 1809 Ambrose Lightship abreast on port.

Ship on voyage from New York to Boston.

Steering according to the pilot's directions.

Page #143

Wednesday, December 10, 1952.

At 0500 proceeded into the Canal. At 0600 went out of the Canal.
At 0800 log hauled in. At 0820 got pilot on board for Quiney.
Steering according with the pilot's directions.
At 0908 at an anchor - waiting for tugboats.
At 0908 tug "Timo" alongside and harbor pilot on board.
At 1005 hove anchor and at 1037 tugs "Triton" and "Athens" came alongside in order to assist the ship alongside the dock.
At 1053 moored alongside the dock at Quincy. Draft: F. 13' 05", A. 18' 07".
At 1300 the deep tanks were ready for discharging of coconut oil
The following measurements were taken by surveyor and the ship's First Officer:

STBD. TANK		
13' 06-1/2"	13' 07"	Temp: - T. 109°F. B. 108
13' 3-1/2"	13' 4-1/16"	

PORT TANK		
20' 9-1/2"	20' 9-3/4"	Temp: - T. 109°F. B. 108
20' 6-3/4"	20' 8-1/2"	

At 1440 commenced to pump the oil from the stbd. tank. Pump and connections from shore. At 1810 stbd. tank empt.
At 1840 commenced to pump port tank. At 2145 tank empty.

Discharged according to advices from shore 1,076,490 lbs., 2803 lbs. above weight.

At 2210 all gear taken ashore and hatches covered.
Draft: F. 11' 09", A. 18' 6".

A.B. Johnson watch during the night.

[fol. 629]

Exhibit R-7

Memo of Wit. Angrosina

Carl [illegible]

Carl Skovgaard

Edward Pomfret

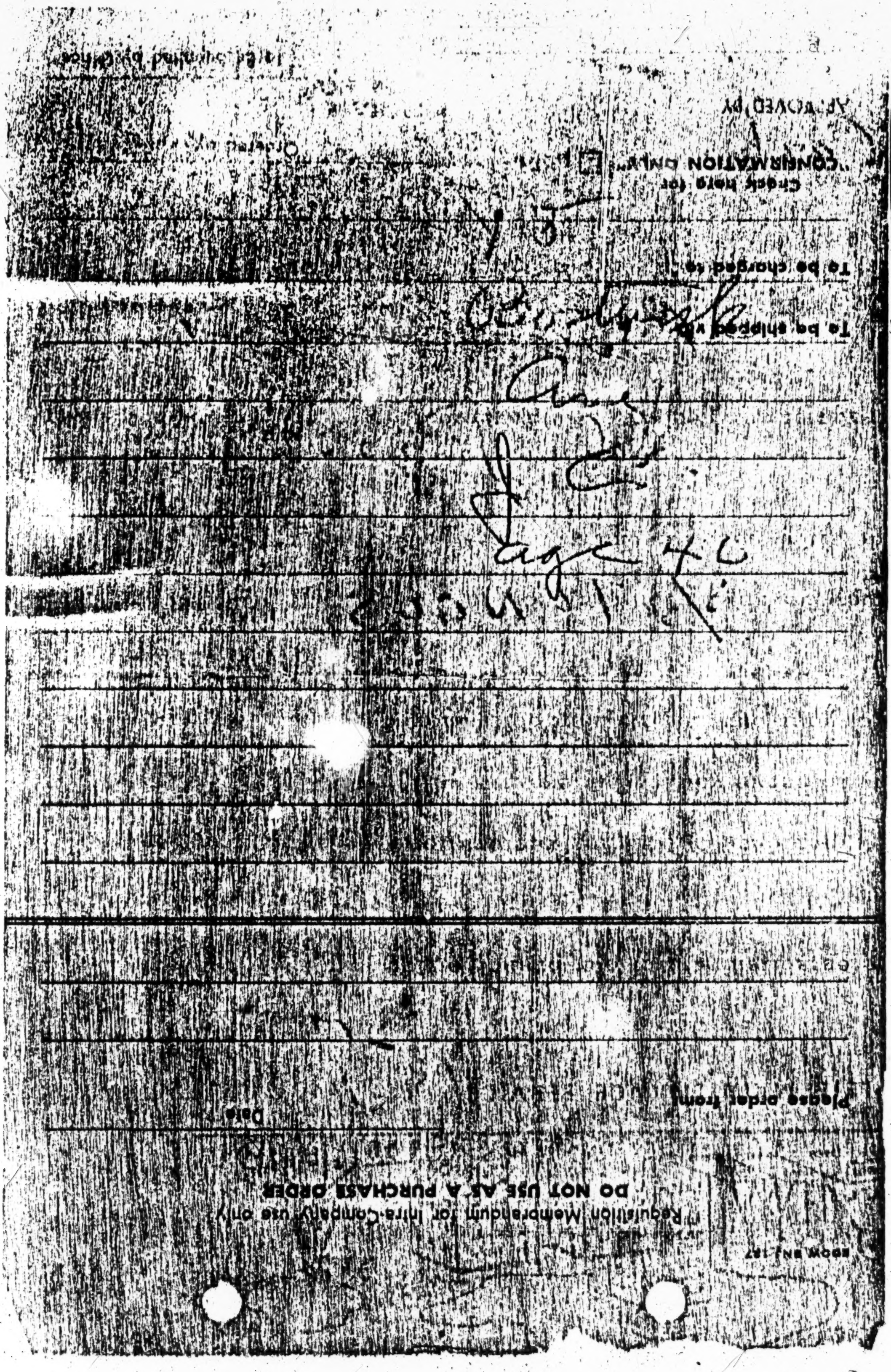
Asst Cashier

S/S TUNGUS

U.S. DISTRICT COURT
FOR NEW JERSEY
NOV [illegible]
EXHIBIT NO. R-7

[fol. 630]

Exhibit R-7
Memo of Wit. Angrosina



has nothing to do with this entire case, and what the Compensation Court of New Jersey says or the Longshoremen and Harbor Workers Compensation Court says has nothing to do with your Honor's decision. But if he wants a stipulation that they paid compensation under the New Jersey Act, we have already stipulated. If he wants to stipulate and say that they have insurance under the Longshoremen and Harbor Workers Act, and they complied with that insurance, if that is his statement, I am willing to stipulate to that.

The Court: For whatever effect, if any.

Mr. Cunningham: Now, at this juncture the respondent-impleaded rests.

Respondent-Impleaded Rested.

[fol. 580] The Court: Mr. Baker.

Mr. Baker: I would like to at this time in rebuttal read Question 18 of the Interrogatories propounded by libelant to the respondent, as follows:

"Set forth the names and addresses of all witnesses to the accident to the libellant's decedent known to the respondents or their attorneys."

And the answer by the respondent, "18. Salvatore Russo, Patrick J. Sexton and Edward Donohue."

And those answers to Interrogatories were submitted under an affidavit which was dated April 26, 1955. And my purpose is to bring to the attention of the Court that one of the witnesses who was produced by the respondent, Mr. Angrosina, has not been mentioned as one of the witnesses known to the respondents or attorneys as of that time.

Mr. O'Neill: Now, if your Honor pleases, there has been testimony here that Mr. Angrosina was seen three weeks ago. As a matter of fact, when your Honor set this case down for trial, and I started going through the file, the first thing I said was, "Where is the watchman?"

Now, a watchman is just as common to the ship as a gangplank. And why he wasn't seen in this case, I don't know.

We then called Mr. Angrosina and he came to see Mr.

Watson in our office three weeks ago, as he said. And that's the story. The story we got here was the same story he gave us then.

Now, very frankly, I knew nothing about Mr. Angrosina, I knew nothing about the other witnesses, until I got into the case and your Honor said you were going to set it down [fol. 581] for a trial. And then I got busy on it. I had other cases.

But why the other people who are thoroughly familiar with ships didn't go out and see the watchman is something I don't understand.

Mr. Cunningham: Perhaps the same reason that Mr. O'Neill's office didn't see the watchman particularly when they——

Mr. O'Neill: I am not excusing myself.

Mr. Cunningham: Of course, we are certainly to be much more to be exonerated than your office, who had a report from Mr. Angrosina. Please don't accuse us.

Mr. O'Neill: I am not accusing. I just want to make this clear to his Honor, because I think—when they talked about the watchman yesterday—Mr. George was here—he had an idea that the watchman was somebody walking around with a suit, and all the rest of it, whereas the fact is every ship that comes in we have a watchman at the gangplank.

I don't excuse myself. As a matter of fact, I said to Mr. Cunningham yesterday that there is somebody to blame in our office for not seeing this guy long before. We should have had him right after the thing happened, but it is one of those things that wasn't checked.

The Court: In the pressure of business, that happens in every big law office. Sometimes the most obvious witness is not interviewed. And I have seen it here in big cases, too. Everybody forgot about a certain witness. Then it turned out when they brought him in at the last minute that he knew more about it than anybody else, and nobody could tell me why they didn't interview him. That happens. Very often we forget the most obvious things.

[fol. 582] [Discussion off the record.]

The Court: Well, you just called that to my attention, didn't you, Mr. Baker?

Mr. Baker: Yes.

The Court: You don't want me to strike out all of Mr. Angrosina's testimony?

Mr. Baker: Well, I think that your Honor sat as a jury, and I think it would be silly for me to make such a motion.

The Court: Yes.

Mr. Baker: So that I am not going to make that motion. I mean, your Honor will handle it as he sees fit, sitting as a judge or a jury in the case.

Now, may I ask if your Honor has decided yet on his ruling concerning the second statement of Donohue which I offered, and I submitted some case. I wonder if your Honor feels that the case is sufficient justification to offer the second statement of Donohue to offset the statement of Donohue which was put into evidence as RI-2?

The Court: Well, was there a contradiction in those statements?

Mr. Baker: Well, there is a small contradiction.

I might say to your Honor that the statement he makes, the second statement, reaffirms what he testifies to on the witness stand.

[Discussion off the record.]

The Court: I think that if there were contradictions in the case they are the human contradictions that happen very often when a witness is interviewed by five or six different investigators at different times. And particularly [fol. 583] is it true after a tragic thing like this where no matter who was there it would certainly affect them to see a thing like this happen.

And we also know this, that if eight people see the same accident, you get eight different versions, believe me.

Now, I don't think that that rule applies in this case. I think we have a case where we have the usual contradictions between witnesses and everything else.

Mr. Baker: Your Honor, may I at this time read just a few lines of the deposition of the Captain, which I think might be of help to the Court.

The Court: Well, if you think it is helpful, all right. But we will take a five-minute recess first.

[Short recess.]

The Court: Now, Mr. Baker, you may read into the record part of the Captain's deposition. You don't intend to read what has already been read in?

Mr. Baker: No. But on page 11—I am reading from Captain Nilsen's deposition, which was taken by the libelant June 27, 1955.

"What are the Chief Officer's duties on board the vessel?

"Answer: His duty is to look after the cargo, upkeep of the ship, and to look after the crew; all the work as to the ship comes under him.

"Question: Is it part of the Chief Officer's duties to conduct inspections of the vessel?

"Answer: Yes."

Page 12, "Question: Do I understand you correctly that his duties are to inspect all the ship?

"Answer: Yes.

[fol. 584] "Question: And he does that physically?

"Answer: Yes.

"Question: Is that by visual inspection?

"Answer: Yes.

"Question: Does he conduct those inspections while discharging operations are going on?

"Answer: Yes."

Page 13. And he is now referring to the Third Officer's duties. "Question: What are his duties while on watch?

"Answer: To see that everything is going all right and the right cargo is going ashore and everything concerning the cargo."

Page 14. "Question: Is it a part of the duty of the officer on watch to be on the lookout for any defective conditions that might arise?

"Answer: Certainly."

Page 18. "Question: What are the duties of the officer on watch with respect to any unsafe conditions that might arise on the vessel?

"Answer: Correct them."

That's all.

Mr. Watson: In amplification, as a direct sequence to the excerpt taken from page 14, the following question and answer were as follows:

"And what are his duties"—referring to the officer on watch—"And what are his duties in the event that such conditions do arise?

"Answer: To notify the people that is doing the work."

And on page 17. "Question: Well, can you answer my [fol. 585] question as to what his duties are then with respect to any equipment that is on board the vessel that is not owned by the ship?

"Answer: I can explain it this way. If we see something wrong with the equipment, of course, we tell it to the people that is responsible for it and have them correct it. That is another thing. They are around there themselves seeing it just as we and they correct it without us telling them."

The Court: Does that finish the deposition reading now?

Mr. Cunningham: I have nothing to read, sir.

The Court: All right. So now the evidence is in that I am to consider. Now, any motion to be made by the respondent or the respondent-impleaded?

Mr. O'Neill: Well, the respondent will move to dismiss the libel. And I may preface that by saying that although the briefs were rather crowded with thoughts of unseaworthiness and general maritime law I think by this time your Honor, by looking at that, has reached the conclusion that they are not before you in this case.

This case is primarily one whether or not this libelant, or this decedent, contributed in any way to the accident.

Now, we have here this testimony. From the time we had what we might call a big leak up until the time he came aboard—or Mr. Skovgaard came aboard, rather libelant's testimony is that there were some of their em-

ployees down in the hatch, they were still working on the pump. There has been no testimony here at all, your Honor, that anybody aboard the ship was told that this pump—that they were finished, they were ready, that the operation was going on again normally.

[fol. 586] These fellows were down there admittedly squeegeeing the tank top covers. They were down there working on this pump, which was a special equipment. Nobody from the ship knew about it. In fact, when we had this leak, I don't think there is any question about the testimony that they yelled for somebody from shore to turn it off. And that is what was done.

Now, with the conditions we have had described here, namely, of pushing oil back here, and pushing oil here, forward and aft of the tank top cover where they were working, that was a perfectly obvious condition.

Mr. Russo—they talk about the one light—Mr. Russo himself, not the first day, but yesterday he testified here, your Honor, that when he got down the hold they dropped down a light to him, out of that corner. The lights are here physically on the ship for your Honor to see. There was lots of light there. There is no question about it. And everybody connected with El Dorado knew there had been a spill, or a leak, in that hold. They are people that work around oil all the time. They know about it. And this man came down. And if he slipped—and there is no testimony as to just what happened—he could have lost his balance walking through there for no particular reason and fall in.

But if we take the testimony as it is, it is that he walked around through this oil, stepped up in here and fell down.

That's the libelant's testimony. Our testimony is different. But at this time I would like to limit myself to the libelant's case.

If this man, no matter how he walked on that hatch, walked through oil, there is nobody more familiar than he [fol. 587] was with the quality of this oil. He worked with this plant—I think it was four years.

Now, a boy, a child, knows that if you walk in something that is slippery, particularly around iron, even if it is just snow, the iron becomes very slippery.

Now, what could anybody aboard this ship have done to prevent the accident? There were El Dorado people down the hold working. They were down there. They had their lights. They had the man who at one time said, "I am in complete charge of this operation," but now limits his authority, as he did this morning—looking down—who testified before, your Honor, as far as he could see it was all right. But this man coming was going down so that the very condition which caused the accident wouldn't happen again. He was going down so that they could test this pump, because this "T" had never been tested, hadn't been used since it had been repaired. It was up to him to go down and test this pump to say that everything is all right, "we will go ahead with the normal operation of the ship."

Now, the only thing anybody on this ship could have done would be to tell all these people, "Get out of the hold of this ship while we go down and scrape up this oil." But it is admitted here that they didn't want anybody to do that. They said they were going to scrape up this oil to salvage it.

So here we have a man sent aboard because he is the big expert of the plant, to do something—as Mr. Donohue said, they were slushing in oil. He got on the oil, and he walks around in the oil and he fell down.

Now, sir, Mr. O'Leary testified before your Honor that the conditions he found here were satisfactory to him. And [fol. 588] he said he was the man who put the pump there. That was his testimony before your Honor.

We went down, we placed the pump—admittedly by all concerned from El Dorado—where they wanted the pump. We had nothing to do with that. We put it down the hold for them. And they took over then from there on.

What could anybody on that ship tell a man who had worked for an oil plant for five years as to what he was to do with a pump—which he had inspected, by the way, that very day.

Now, I say this, sir. He went down there. He took these conditions as he found them. It is like a man walking through a dark hallway. There is nothing wrong with the

ship, because she was working, and had to work—to get the cargo out had to work this way. There is nothing we could have done for this man in this particular case. It is just like telling a child, when you send him down the cellar without a light, to be careful. You find anybody feels their way along in the dark. But we do have people who walk ahead and fall.

Now, there is nothing we can tell a person of experience. And I don't think there is any case that has gone that far.

Now, the Anderson case that Mr. Baker talks about was this. The ship came in with a cargo of cashew nut oil. The cashew nut oil, if you come in contact with it, has a tendency to create this itch. Sixteen men, I think it was, were affected. And we tried the case and the jury threw out eight and gave money to six. But when we went to the circuit court the circuit court said this. The officers of the ship should have known the characteristics of cashew nut oil and should have told the men about it. And it wasn't [fol. 589] that we told the stevedores. That is what they said in that case.

But here we have a situation of a man who knows more——

The Court: Did you tell the stevedore about it?

Mr. O'Neill: Well, they knew about it, too.

The Court: They didn't relay it to their men?

Mr. O'Neill: No. And the court held on that and threw out the other eight. In other words, they affirmed the jury verdict.

But that was a case—that isn't this case, because in this case we have a man—men, rather—we have the receiving foreman, Mr. Sexton; we have Donohue, who is an assistant maintenance man; we have Russo, who was a worker in this plant for quite some time. These are all men thoroughly familiar with this oil. They are the ones who know how to pump it. They were the ones who knew enough to go down and bleed the pump to start the pump. There was nothing we could tell them, sir. Not a thing.

Now, I think it is common knowledge—the fact that your Honor will take judicial notice of it—that oil is slippery and if you walk through it, it says on your shoes, and if

you walk on iron with a slippery substance on your shoes, something is going to happen.

And on top of that, why would these men tell these fellows, "Be careful about oil," because, as Mr. Sexton said, the very men who went down there working, before they were finished down there, were going down where the oil was in the bottom of the ship, bottom of the tank. They were going to scrape it off the sides. They were going to walk around in the oil.

Now, what could we tell people like that? They knew [fol. 590] that. They do it on every ship. I think they said they had one or two ships a month over there.

And I don't see, sir, in this case, where there is anything the respondent could have done to warn this man against his own negligence.

And, as I say, I don't think your Honor has any problem of the maritime law here. It isn't in the case. We are not concerned with that at all. We are more on the, let's say, the McFall case, which is followed by the courts of Jersey.

Now, in that case we had this situation. A ship came in and they took on carbon tetrachloride. Carbon tetrachloride was loaded in a deep tank, much like we have here. The ship closed up over Labor Day and when the men came back on Tuesday morning they were sent immediately down into the hold of the ship. They went down and in less than 15 minutes they started falling over like tenpins.

Now, in that case the court of appeals said this. The responsibility there was the people that shipped it—not shipping it in proper containers—and the people who were handling it, the stevedores. They put it down there. They handled it down there. There was some knowledge on their part that it had leaked on the dock. And in spite of that, when they picked up the drum that had left the ring there, they took it on the ship. And that was held to be negligence on their part because they knew about the leak, and knowing about the leak they should have known it was going to leak in this deep tank.

Now, the fact that the ship told them to put it in the deep tank, and the fact that it was carbon tetrachloride, which is very dangerous—they exonerated the ship in that case.

[fol. 591] Now, this situation I think is even much stronger, your Honor, because here are people who hold themselves out as being specialists in this type of work. There is no question about that. I think that is definitely settled in the case. They come in and they say they used the ship's winches to put these tank covers on. There was a lot of nonsense back and forth about who wanted the tank cover, but that's immaterial because O'Leary, the man who was there and charged with placing the tank cover, said, "I was satisfied with it." So whether I did it or somebody else did it is immaterial in this case. He is the man, and he said, "Turn it around so my suction line goes into the tank and I am satisfied."

Now, from there on there was nothing for the ship's crew to do. This pumping apparatus was up on this saddle. All they (sic) to do was listen. If the thing was going, everything was all right. They didn't have to go down and inspect the pump. And indeed that is admitted. It is admitted that as soon as these people heard there was something wrong with the pump they immediately dispatched somebody over to take care of it and that somebody knew how to turn the pump off.

Now, from there on we have El Dorado people working in that hold. And, as I say, the only thing—and I don't think the law imposes this obligation—that we should say to them, "Get out of the hold until we clean all this oil so you fellows can continue." And that is what would have happened.

And we had no way of knowing at that time, sir, that immediately after this pump started that that "T" was going to hold. That had never been tested. It was up to them to say again that it is all right now that the "T" is in there. We had nothing to do with that.

[fol. 592] And anything that went on down there, as Mr. Sexton told you, and the Chief Officer told you—this cocoanut oil is very valuable. They didn't want anything to happen to the oil. Mr. Sexton admitted that. And Mr. Donohue admitted that. They wanted this oil.

So I don't see, sir—I don't see any duty on our part. And I think that it is perfectly evidence (sic) that where anybody walks through any slippery substance and then to

walk around on iron after that—that that, sir, is contributory negligence, as a matter of law.

Mr. Cunningham: The respondent-impleaded moves to dismiss the impleading petition. I will not refer to the facts, but only to the law.

I agree with Mr. O'Neill—and apparently with Mr. Baker as well—that unseaworthiness and the general maritime law is not a portion of the problem before your Honor. I am going to refer in this brief recollection of the law merely to notice and proximate cause, which I think is the big problem before your Honor.

If the vessel had no duty to clean up the oil then the vessel is not liable to the libellant. Therefore, of course, the impleading petition must necessarily fall.

If, however, the vessel did have a duty to clean up the oil, and it failed to do so, then it is guilty of negligence—not negligence of a constructive type, but real negligence, because they had notice of the fact that the oil was there. Consequently, if they are guilty of negligence of that kind, in view of the notice they had, then since there can be no contribution in admiralty, in view of the Halcyon case, re-[fol. 593] gardless of whether or not that negligence was 15 per cent or 25 per cent, then the impleading petition must necessarily fall as well, since they can hold us only if they are held liable merely because of a constructive negligence.

The reference to the McFall case is apposite except in the McFall case the shipowner was held liable for a failure to warn, in the McFall case the shipowner had no notice that there was any defect. The only reason the shipowner was held initially liable in that case was because the shipowner failed to warn the longshoremen that that cargo could be dangerous. In that case, where there was a defect of which the shipowner had no notice, then they were held to be only constructively negligent.

However, in this case, if the shipowner had a duty and they failed to comply with that duty after notice, that is not the type of negligence that is referred to in the McFall case.

So, therefore, I say either the libellant may not recover against the vessel, because the vessel had no duty to clean the oil, or the libelant may recover against the vessel be-

cause the vessel had a duty to clean the oil after the vessel had notice. If your Honor holds either one of those ways the impleading petition must fall.

Furthermore, there is another problem—of proximate cause. There is evidence here that there were hatch beams in the passageway between the tank covers. If your Honor finds that the presence of the hatch beams proximately caused this accident, regardless of the amount that your Honor's mind feels was attributable to the presence of the hatch beams, then the impleading petition must again fall, because if we are liable for anything we are liable because we had a duty to clean up the oil. Of course, if we had a [fol. 594] duty to clean up the oil, and the vessel didn't, then the impleading petition must fall.

However, if the proximate cause was the oil and hatch beams, and we had nothing to do with the placing of the hatch beams, again the impleading petition must fall.

Therefore, where there has been notice to a vessel, such as there has been obvious notice in this case, there is not the situation that occurred in the McFall case where a vessel has no notice of a defect, but should know that if there had been a defect the stevedores working there would be hurt. And in that case, the McFall case, they rightly said, "The vessel is liable here merely because it is a vessel owner, merely because it ought to know that it is carrying dangerous cargo, but it didn't know the drums were broken. The only people who would know that were the people who were handling the drums. Therefore they may recover over against the people who were handling the drums because the ship had no notice of the defect."

However, I say again, where there is notice of a defect, it removes us from that category of negligence known as constructive or passive negligence.

Consequently I repeat my motion to dismiss the impleading petition. And I think it is so clear on the law that your Honor can grant the motion to vacate or dismiss the impleading petition without further ado in the case.

Thank you, sir.

The Court: Mr. Baker, of course you represent the libellant and you have the laboring oar. You have to establish

that there was a duty owed by this ship to this victim and that that duty was violated.

[fol. 595] Mr. Baker: That's true.

The Court: I don't know whether you want to argue that orally.

Mr. Baker: Well, I could briefly argue that portion of it orally. I will make it very brief. And as long as counsel have referred to their arguments briefly, I will also do likewise.

The Court: Yes, sir.

Mr. Baker: I submit to your Honor that we have placed into proof here a number of allegations of negligence, and some of them are disputed. For instance, the allegation that we claim there was a lack of light. That has been disputed, so that there is a question of fact for the Court to decide at the termintaion of all the evidence on that point.

We have also submitted some proof that the proper and the standard way, and the safer way, of discharging oil is by keeping the hatch closed and discharging it through this little hole, or little——

The Court: They call it a manhole and ullage.

Mr. Baker: That I think has been disputed by some of the witnesses. But I think that there are at least two elements which counsel have referred to where I don't think it is disputed. And I will show it to your Honor.

Number one, the beams, the hatch beams between the two hatch covers. Everybody admits it is there. I think it is unquestioned that it is a passageway. I think it can be unquestioned that there is an obstruction in the passageway, especially when people work in that vicinity.

And I submit to your Honor that no proof has been sub-[fol. 596] mitted by the respondent in any way which indicates that they did not obstruct that passageway with these beams, and that they were there. I submit to your Honor that on that point alone there is active negligence on behalf of the vessel.

But, in addition to that, your Honor, we have the oil question. And on the question of oil I say that it is undisputed that the ship is responsible, from their own testimony, even if we disregard completely all of the evidence

of the libellant's witnesses, and the respondent-impleaded, the oil company's witnesses, on the basis of the respondent's own testimony and on the basis of their own log entry, they are responsible for negligence. I am not even going to unseaworthiness yet, your Honor, because in their own log entry they knew that there was a spill of oil, they knew that it was a dangerous condition, and they put in their own log entry—and it was so admitted by their Chief Officer—they knew about it. A question of time—an hour before, an hour and a half before, two hours before, a half hour before—but certainly before Mr. Skovgaard met his death. And they brought it to somebody's attention. They brought it to Mr. Sexton's attention, of the oil company. And they told him that—it says here in the log entry—"The ship's Chief Officer had called attention to that one had to scatter sawdust or sand on the tank cover before work was resumed."

They knew about it. They knew that sawdust or sand must be placed upon it. The Captain said that "I don't know whether we had sawdust." The Chief Officer says, "I did have sawdust."

They had a duty, I say, your Honor, to have sawdust [fol. 597] aboard. But the Chief Officer said, "We had it."

We haven't disproved that. We can't. But, your Honor, they knew about it. They knew that something should be done about it, to protect the men. In fact, as I recall, the Chief Officer says for the safety, or to mitigate—or whatever words he used—for the protection of the men who might be working there. And he says that he told Sexton of the oil company to take care of it.

Sexton denies it. But on their own testimony, on their own log entry, they knew of this condition. And the primary duty to clean the oil is the ship, your Honor. There can be no question about it.

The Court: I wish I were as sure of that as you are.

Mr. Baker: I am sure of that. That is the law. The men testified to that, but that didn't make the law. It showed their conduct, and their understanding, and their practice, and their usual practice, but that didn't make the law. The law is right in the books, that it is the duty of

the ship to clean any oil or any unsafe condition. That is their primary duty.

The Court: Even to the employee of a company that has slopped the oil all over the place?

Mr. Baker: Yes.

The Court: I could believe that as to a passenger on that ship that might be so.

Mr. Baker: Yes, to anyone.

The Court: To anybody.

Mr. Baker: Any unsafe conditions, no matter how created, it is their primary duty to clean. They knew about it.

The Court: There is no doubt that they knew it. I am [fol. 598] convinced of it.

Mr. Baker: And then they can't delegate it, which they attempted to do, in their testimony, and according to the log book they delegated it to the oil company, they say, "You spilled it. You put the sawdust and sand." They can't do it. The law says they can't delegate their duty. They have that duty given by the law. It is not what I say, but what the books say—they can't delegate that duty to someone else and exculpate themselves from responsibility.

Of course, it may raise a question as to whether or not on that situation there is any right by the respondent, of the vessel, as against the impleaded respondent, as to what the responsibility might be between them. But as far as the person who has been injured, and as far as the responsibility to him, they have a duty which they can't delegate.

The Court: Would that be so even if Mr. Russo fell in, or Mr. Donohue? Let's assume that one of them fell in, after they slopped it all up, and they slipped on the very oil that they left laying around there.

Mr. Baker: It may be a question there as to whether or not they were guilty of any contributory negligence.

The Court: Well, that is always a question. I am not going that far. Absent contributory negligence, Russo and Donohue slopped this place all up with oil. And we must assume since they do this kind of work that they know that oil is slippery. Maybe I wouldn't know it, but they would know it. And then one of them fell in, while he was fixing that pump. Would you say it was then the duty of

the Tungus crew to come and clean the oil away from around [fol. 599] the pump so that they wouldn't fall in?

Mr. Baker: I am going to go a little further, your Honor. I will go further. And I am referring now particularly to a case which held this point—where it is a crew member whose job was to fix a pump—a crew member now—this is from the same ship. And he slips in oil which was dropped, or was the duty of his crew members to remove.

The Court: A fellow crew member.

Mr. Baker: A fellow crew member. They have held that he can recover. In other words, his job wasn't to clean the oil, that was the job of a certain crew member, that department. His job was just to fix the pump. I will give you the case. That is the Mormino case decided by Judge Leibell, a very capable judge in the Southern District.

The Court: I will admit this, Mr. Baker, at this point, that the more I go into admiralty law and read cases I am astounded at some of the holdings I read.

[Discussion off the record.]

Mr. Baker: Well, that is off the subject, but I just wanted to bring out that—when your Honor mentioned that there is absolute liability——

The Court: Not quite, almost.

Mr. Baker: I would say that it is almost. And I would submit to your Honor that where you take a case like I just mentioned, Mormino, where a fellow crew member, not an outside party, but a fellow crew member—his job was to clean the oil, and this Mormino's job was just to fix the pump, then he is entitled to recover, because of the fact that his fellow crew member didn't clean the oil.

[fol. 600] The Court: That is going pretty far, I will admit that.

Mr. O'Neill: If your Honor please, if I may interrupt at this moment, I think we should keep before your Honor—keep the seamen's cases out, because there there (sic) is a statute which says the seaman can sue because of the negligence of a fellow crewman.

The Court: That's statutory.

Mr. Baker: We know that. But here we still have by reason of the negligence of the ship—the ship's duty is to

clean the oil, to inspect it. Here they knew of it. Here they knew sawdust should be put there, they knew sand should have been put there. They said—which has been denied—"You take care of it." They can't do it. They can't delegate it. And one of the best cases, I think, on the subject——

The Court: I know they can't.

Mr. Baker: —is the Anderson case. And that is cited every day.

The Court: Because that would be too easy to get out of trouble, to say, "We told somebody else."

Mr. Baker: They said they told the foreman and they told the stevedores' company that they knew. And it was held that it is not a defense, as against the longshoreman himself, individually.

The Court: Now, Mr. Baker, will you wait? I will tell you why. I have got to sit as judge of the law and judge of the fact in this case. And you members of the bar know that that is not a pleasant duty at times. It is a very onerous duty at times.

What I should like, because you are the one who must [fol. 601] impress me that you are entitled to recover under the facts that we have in this case—strangely enough, there is not as much contradictory evidence in this case as I thought we were going to have. I think some facts are pretty well established here, as well as they can be established by human beings. You will make for me proposed findings of fact and conclusions of law upon which you predicate the liability of the vessel. Because I won't have too much trouble as to between the respondent and the respondent-impleaded. And, of course, you will send copies of those to Mr. Cunningham and Mr. O'Neill. And then they may submit proposed findings of fact, and if you think there is evidence in the record to justify those that you propose, and with your conclusions of law. Because I like to read them at my leisure, and study them very carefully. I don't want to be moved impulsively by any plea that Mr. Baker might make here.

[Discussion off the record.]

Mr. Baker: How much time would you suggest?

The Court: Well, I know you are a very busy man, but the quicker the better, because now the facts are rather fresh in my mind, and they will stay that way for a while.

Mr. Baker: They are fresh in my mind and I would like them to be made in two or three days.

Mr. O'Neill: We have to get the record. I think the Judge would want the record.

The Court: Well, what I like is to have them keyed to the record.

Let's do it this way. As soon as you get the record—and Mr. Bremer will tell me the day he delivers it—how [fol. 602] many days will you require then after you get the record, Mr. Baker?

Mr. Baker: I would say a week at the most.

The Court: A week is enough for you? All right. A week for you and a week for you.

Mr. Cunningham: That's in answer to his.

The Court: Yes, sir. If you feel that he makes findings that are not warranted by the evidence, you have to demonstrate it to me, naturally.

Mr. O'Neill: Then on briefs, is it your Honor's thought that we——

The Court: Here's what I want you to do on briefs. You both gave me briefs—a lot of the cases I can't use at all here—I don't want you to repeat in your memorandums of law anything that you have set forth in the trial memorandum, but refer to it. But anything new that you think would help me, I would like to have, Mr. Baker and all concerned, because, as I told you, I am not an experienced admiralty man. So you men must teach me properly.

Mr. Watson: Will Mr. Baker serve briefs on us at the same time as the findings of fact?

The Court: If he can do it; yes, sir. We usually give 10 days to the one who is carrying the laboring oar to establish a proposition, and five days for answer. That is the general rule around here.

Mr. O'Neill: I was going to say this, sir—in order to cut down on the brief—if we can at this point agree that unseaworthiness and the general maritime law is not in the case we can concentrate on something else, and naturally

[fol. 603] the brief given to your Honor is going to be much smaller, even referring to page 15, and that sort of thing, in the main brief. We could probably cut out an awful lot in this case. Can we agree on that?

Mr. Baker: I certainly cannot agree, because I say unseaworthiness and negligence—we are going to ask your Honor to make a finding on unseaworthiness and negligence.

The Court: Then you will guide yourself by what he sets forth in his memorandum. And the quicker I get it the quicker I will determine it.

Is there anything you want to say, Mr. Baker, before I recess?

Mr. Baker: That is all.

Mr. O'Neill: Thank you very much.

Note

Pages 539 - 551 are
on Card 8;
Pages 552 - 565 are
on Card 9.

EXHIBIT R-8
REPORT OF WIT. ANGROSINA

Saturday Mar. 6, 1952

To

Mrs. Roberts Publicity Agency
#6 State Street
New York City.

U. S. DISTRICT COURT
FOR NEW JERSEY
NOV 9 1955
EXHIBIT NO R-8

On the morning of Mar. 6, 1952 at 1.25 A.M. while directing his men in deep coconut oil tank size #3 Hatch on the S/S Tongue Mr. Carl Skovgaard a foreman for Eldorado oil Company of Bayonne N. J. slipped on some oil on tank cover on (A) deck and falling over and striking his head on ~~a~~ coaming of (B) deck tumbling into oil tank on (C) deck fill with warm coconut oil. One of his helpers a Mr. Del Russo jumped into oil tank to rescue him but it took about 10 minutes before he could locate him. After finding body a Mr Edward J. Onslow a fellow worker assisted him to bring the body out of oil tank. A Doctor from Bayonne Hospital pronounced Mr. Skovgaard dead at 1.55 A.M.

ADDRESS
Mrs. Skovgaard
85 Roebling Ave.
Jersey City
N. J.

Signed
Frank Angrosina
777 Van Duzer St
S. I. #4. N. Y.
Guard on Ship Badge #717

[fol. 632]

EXHIBIT R-10
PHOTOGRAPH OF HOLD OF M/S TUNGUS

Alfred H. Miller Co. Inc.
25 WILLIAM STREET • NEW YORK 5, N. Y.

S/S Tungus
Jan. 11, 1955

[fol. 633]

EXHIBIT RI-2

STATEMENT OF WIT. DONOHUE

U.S. DISTRICT COURT
DISTRICT OF NEW JERSEY
NOV 9 1955

6

TUNGUS — CARL SKOVGAARD

EXHIBIT NO. RI-2-E — DEATH, DEC. 6, 1952.

My Name is Edward Donohue and I live at 11 Meadow St. Bayonne, N.J. I have been employed as Asst. Maint. Forman by El Dorado Oil Co. from Feb. 8, 1950 to date.

I recall Carl Skovgaard who was Maint. Forman employed by El Dorado Oil Co. On Dec. 6, 1952 at about 12^11^ am, the electric pump part of equipment of El Dorado Co. manned M.S. Tungus was stopped in order to repair a break in discharging line whare steam line was connected to discharging line. When I went into hatch to repair line there was about 4" in. oil on tank top arround the pump. I replaced the

steam line was connected to discharging line. When I went into hatch to repair line there was about 4" in. oil on tank top arround the pump. I replaced the

broken pipe and attempted to start the pump. I could not get pump started because it had lost suction.

When I first arrived in the shelter deck to repair the pipe I squeegeed the oil off the tank top from arround the working area arround the pump. No sand or sawdust was put down as we intended to salvage the oil.

Skovgaard came into shelter deck after we had finished repairing the pump and while we were trying to start it. He walked arround tank combing on port side to port after corner, standing on shelter deck watching us. Then he walked arround after side of combing and in between

Edward Donohue.

[fol. 634]

EXHIBIT RI-2

STATEMENT OF WIT. DONOHUE

THE COMBINGS OF PORT AND STARBOARD TANKS. I RECALL THAT THERE WERE TWO BEAMS ON SHELTER DECK BETWEEN THE PORT AND STARBOARD COMBINGS. I SAW SKOVGAARD STEP UP ON BEAMS TO TANK TOP. HE SLIPPED AND FELL THRU OPEN PART OF TANK INTO TANK ITSELF. I ASSISTED RUSSO TO RECOVER HIS BODY.

Edward Donohue

Dec 6 1952

STATEMENT TAKEN AT OFFICE OF EL DORADO OIL CO. AT BAYONNE, N.J. ON DEC. 6, 1952 BY H. CHABAULT.

[fol. 635]

IN UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 12-55

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, Libelant,

—v.—

The vessel m/v TUNGUS, her boilers, etc., and DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMPSKIBSAKTIESELSKAB, et al., Respondents,

—and—

EL DORADO OIL WORKS, Respondent-Impleaded.

OPINION

Modarelli, District Judge.

In October, 1952, at a foreign port, coconut oil was loaded into the two deep tanks of No. 3 shelter deck of the respondent cargo vessel m/v Tungus. On December 5, 1952, at 5:30 p.m., she docked at a Bayonne, New Jersey, pier. The owner of the oil in the port deep tank having arranged with respondent-impleaded, El Dorado Oil Works to discharge and store the oil, cargo surveyors and El Dorado workers went aboard to prepare for the discharge of the oil from the port tank.

Under the supervision of the El Dorado workers, two of the ship's crew operated winches; they were aided by one officer of the ship; the port deep tank lid was lifted, rotated 90°, and lowered to a position across the top of its coamings so that the after third of the tank was open. The El Dorado workers were satisfied with the position of the tank lid. A pump, owned by El Dorado, was lifted by the ship's winches and lowered into No. 3 shelter deck and placed on top of the port deep tank lid under directions of an El Dorado worker; he also directed the rigging of the

suction and discharge hoses. Two hatch beams were lying [fol. 636] side by side between the port and starboard deep tank coamings; the beams were used when dry cargo was carried in the tanks. The location of the beams was the normal storage place during the hauling of liquid cargo. The testimony of Wagner, who was employed by El Dorado as a maintenance machinist describes the condition of the pump prior to its use:

"A. I received—that morning I received orders from my supervisor, Mr. Skovgaard, [his death is the basis of this action] to repair the pump, check it, because the ship is coming in later that day. I went down to where it was, in the mill building below the machine shop, and I went through my routine inspection, realigned the gears, and I told Carl [Skovgaard] what else I can do.

"He told me it would be a good idea to go ahead. I put four pins in the legs of the pump to secure it to the base so she don't shift on us. I also put new packing in, in the glands, and new fins inside the pump.

"Q. New what?

"A. Fins, blades that bring up the oil.

"Q. After you were finished with this inspection and repair of the pump, what did you do?

"A. I called it to the attention of Mr. Skovgaard. We both went over it. We turned it by hand to make sure it is workable, and everything, and we were both satisfied that she was in good working condition.

* * * * * * *

"Q. But when you and Carl Skovgaard were finished inspecting the pump, and you were both convinced that it was working properly——

"A. Yes, sir.

"Q. —what did you do with it then, did you put it on the pier to await the arrival of the ship?

"A. Yes. They took it on what they call a stringpiece, or something, on the side of the pier and put it there." (Transcript, pp. 542-543.)

At 8:05 p.m., December 5, 1952, El Dorado's workers began to discharge the oil from the tank of the m/v Tungus.

[fol. 637] Attached to the pump was an air injection nipple, which was not an integral part of the pump but was made by El Dorado workers out of parts in stock and then attached to the pump. The ship's log book entry for December 6 describes the next event, which occurred at 12:15 a.m.:

> "At 0015 the oil connection burst where the steam pipeline is screwed on to same, becoming leaky. The leakage was detected by the ship's 3rd Officer who was on watch. The 3rd Officer tried immediately to call men from the pump crew, but it was found that none of the pump crew was on board. Before the 3rd Officer had succeeded in getting hold of the men which were down on the dock the connection was broken off and the coconut oil gushed out into the starboard side of the shelter deck and down through the hatch covers in the forward part of the tank into the No. 3 lower hold. The pump was stopped immediately as the men came on board. The oil, however, continued to pass through the leaky place as the oil was running back through the oil hose. However, one succeeded in stopping the leakage by inserting a plug, but not before several tons of oil had run into the deck and lower hold.
>
> "The oil stained about 50 paper bags desiccated coconut bound for Boston stowed in the starboard side of the shelter deck.
>
> "The oil ran underneath mahogany lumber which was stowed in the after part of the shelter deck in No. 3. It continued through the shelter deck into No. 4 under bales of rugs which were stowed there. In the lower hold No. 3 are stowed steel plates, scrap brass metal and mahogany lumber."

As a result of the oil spill, liquid coconut oil covered the entire area surrounding the pumping operation, including the top of both tank lids, the area forward of the tank coamings and between the port and starboard tank coamings. After the pump had been stopped the chief officer of the ship and the cargo surveyors went into the shelter

deck to ascertain the extent of the cargo damage. Donohue and Russo, El Dorado employees, then replaced the broken fitting on the pump after "squeegeeing" * the spilled oil [fol. 638] from a working area sufficient to repair the pump. The deceased Skovgaard, a maintenance foreman employed by El Dorado, was called from his home to assist in repairing the pump and restoring it to operation. At 1:25 a.m., he boarded the vessel. Since Donohue and Russo still were working on the disabled pump, he went down into No. 3 shelter deck to assist them. In moving from the foot of the ladder leading down from the main deck to the shelter deck, Skovgaard walked through the area over which the oil had spilled. As he walked aft of the port tank, he stepped on either one or both of the hatch beams; then as he attempted to step onto the top of the tank he slipped on the spilled oil and fell to his death into 8 feet of hot oil contained in the hatch opening of the port tank.

Libelant argues that she has two separate causes of action: One, under the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 et seq., for negligence and the other under the general maritime law of unseaworthiness. The question already has been decided. In *Levinson* v. *Deupree,* 345 U.S. 648, 650 (1953), the Court held that "The maritime law does not allow recovery for wrongful death. The Harrisburg, 119 U.S. 199; Butler v. Boston & Savannah Steamship Co., 130 U.S. 527, 555. In 1920, Congress adopted a Lord Campbell's Act restricted to deaths on the high seas, 41 Stat. 537 et seq., 46 U.S.C. §761 et seq. * * *." In *Just* v. *Chambers,* 312 U.S. 383, 388, 389 (1941), " * * * this Court, upon an elaborate review of the decisions, concluded that no suit for wrongful death would lie 'in the courts of the United States under the general maritime law.' The Harrisburg, 119 U.S. 199, 213. See, also, The Consair, 145 U.S. 335, 344. The absence of a federal or state statute giving a right of action was emphasized. But when a State, [fol. 639] acting within its province, has created liability for wrongful death, the admiralty will enforce it." Further, at page 391, the Court said: " * * * The pith of the matter is that the maritime law, as we conceived it, did not permit

* Done by the use of a squeezeable mop.

recovery, [in the case of wrongful death] and in the same sense * * *." The Court of Appeals for this Circuit also has spoken; in *Klingseisen* v. *Costanzo Transp. Co.*, 101 F. 2d 902 (CA 3 1939): "* * * In the case at bar, we may not apply the familiar rule of admiralty where contributory negligence serves to divide the damages. It is settled that no suit may be brought to recover damages for death in an admiralty court of the United States under general maritime law. Such a right exists solely by statute. The appellant has based her suit upon a statute of Pennsylvania. * * *."

Thus it is clear that libellant's recovery, if any, is under the New Jersey Death Act, N.J.S.A. 2A:31-1.

Incidentally, the respondent and respondent-impleaded both refer to a proceeding instituted by the libelant in the New Jersey Department of Labor and Industry, Division of Workmen's Compensation, Hudson County District, in which the then respondent, El Dorado Oil Works, questioned the jurisdiction of the New Jersey Compensation Bureau, alleging that jurisdiction was under the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. §903 et seq. In his decision, Deputy Director Lorenz held that the New Jersey Department of Labor and Industry, Division of Workmen's Compensation, had jurisdiction over the petition seeking compensation for the death of Carl E. Skovgaard, holding "that, being in the twilight zone, the decedent, *not being connected in any way with the operation of the ship,* I find comes under the protection of this Division." (Emphasis supplied). A compensation award was accordingly made for the payment to the widow, [fol. 640] libelant herein, until May 12, 1969, at which time the youngest child of the decedent will reach the age of 18.

The libelant alleges that respondent's negligence consisted of: (1) Allowing the port tank to remain partly open without placing ropes or other barriers around it, (2) inadequate lighting in the shelter deck, (3) placing iron beams in the walking space between the two tanks, (4) leaving oil on the deck, tank lid, beams, and in the walkway between the tanks near an open, unguarded tank.

As to (1), there was no negligence in allowing the tank to remain open as part of the cargo unloading operation.

The tank opening was necessary to discharge the oil. See *Long* v. *Silver Line, Ltd.*, 48 F. 2d 15 (CCA 2 1931); *The Kongosan Maru*, 292 F. 801, 803, 804 (CCA 9 1923); *The Louisiana*, 74 F. 748, 750, 751 (CCA 5 1896).

As to (2), on the night of Skovgaard's death there were four permanent deck lights forward and aft of the hatch, and two reflectors with 500 ampere bulbs immediately after the hatch; there were also four regular cargo lights shining directly into No. 3 shelter deck. Additionally, the lighting in the hatch was adequate for two surveyors to make their calculations and for Donohue and Russo to replace the sheared-off air injection nipple.

As to (3) libelant cites only *Cooney* v. *United States*, 74 F. Supp. 26 (W.D. Wash. 1946). In that case, hatch boards had been piled or loosely thrown on deck, causing the ship's deck engineer to fall when he stepped on the pile while he was walking along the deck. The court concluded that there had been a negligent piling of the boards. The case does not hold that the mere presence of boards is negligence but only that an improper piling of boards is a [fol. 641] negligent condition. Here, there is no proof that the iron beams were unfit to walk upon, aside from the fact that they were covered with oil, which will be discussed. Moreover, the facts are inconsistent with the theory that the presence of the beams caused Skovgaard to fall into the tank. His fall was caused by slipping when he had at least one foot already on the lid.

As to (4), the issue correctly is stated by respondent: Whether during the repair operations it was the vessel's duty to the deceased to clean up the oil spill. Respondent forcefully contends that "Not a single authority has been cited by proctor for libellant which spells out a duty on the part of the vessel to clean up an oil spill caused by the very parties whose sole duty and function it was to discharge the oil properly, and whose employee it is who is now attempting to recover." The court agrees. In support of her proposition that it was the vessel's duty to clean up the oil spill, libelant cites *Anderson* v. *Lorentzen*, 160 F. 2d 173 (CA 2 1947); *Fodera* v. *Booth American Shipping Corporation*, 159 F. 2d 795 (CA 2 1947); *Santamaria* v. *Lamport & Holt Line, Ltd.*, 119 N.J.L. 467 (E. & A.

1938); *McFall* v. *Compagnie Maritime Belge*, 304 N.Y. 314 (1952). None of those cases aid libelant. The negligence of the vessel in the *Anderson* case was in its failure to warn a longshoreman of the dangerous nature of the cargo. Here, however, the dangerous oil spill was known to Skovgaard. In *Fodera*, the negligence clearly was that of the shipowner and not, as here, that of the injured party's fellow employees. *Santamaria* does not hold that a shipowner is liable to a worker for a condition created by his fellow employees. Moreover, under New Jersey law when the employee of an independent contractor enters property at the instance of the owner to correct the precise condition [fol. 642] which later causes the employee's injuries, the owner is not liable unless he supervised or controlled the employee. *Broecker* v. *Armstrong Cork Co.*, 128 N.J.L. 3 (E. & A. 1942). Here, Skovgaard boarded the vessel to help repair the defect and restore to operation the pump which caused the oil spill. The entire repair operation was conducted by El Dorado, and there is no evidence from which to infer that any m/v Tungus personnel supervised or controlled either the discharge of the oil from the tank or the repair of the pump. In *McFall*, the court held that a longshoreman who is employed by an independent contractor *engaged by the owner* to load its ship, is an invitee aboard the vessel. "As such he is entitled to a reasonably safe place to work. The duty of exercising reasonable diligence to provide such a place and warn the longshoremen of hidden dangers devolves upon the owner of the ship. * * *." Page 324. Here, however, the independent contractor El Dorado was engaged by the owner of the cargo who was not the owner of the ship.

I am not persuaded that the owner of the vessel is under any duty to protect the workmen of the independent contractor, El Dorado Oil Works, engaged by the owners of the cargo of coconut oil, against the dangerous conditions created by the very work for which the independent contractor was hired. Accordingly, the court finds that the respondents are not liable for Skovgaard's unfortunate death and the libel must be dismissed.

The foregoing opinion shall constitute findings of fact and conclusions of law, as required by Rule 52.

An order may be submitted in conformity with the opinion herein expressed.

[fol. 643]

IN UNITED STATES DISTRICT COURT
FOR DISTRICT OF NEW JERSEY

Civil Action No. 12-55

AMENDED JUDGMENT—June 25, 1956

This cause having been duly come on to be heard in its regular order on November 3, 4, 7, 8, 9 and 10, 1955, upon the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties, and the court after due deliberation, having rendered its opinion in writing and directing a decree dismissing the libel herein, it is, on this 25th day of June, 1956,

Ordered, that the opinion of this court heretofore filed herein be and hereby is adopted as the court's findings of fact and conclusions of law pursuant to Supreme Court Rule 52, and it is further

Ordered, Adjudged and Decreed that the libel herein be and the same hereby is dismissed on the merits, without costs, and accordingly, it is further

Ordered, Adjudged and Decreed that the impleading petition herein be and the same hereby is dismissed without costs.

/s/ Alfred E. Modarelli, Judge, United States District Court.

[fol. 644]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action #12-55

NOTICE OF APPEAL—July 9, 1956

Notice is hereby given that, Olga Skovgaard, libelant above named, hereby appeals to the United States Court of

Appeals for the Third Circuit from the amended final judgment and decree dismissing the libel herein on the merits entered on June 25, 1956.

Baker, Garber & Chazen, Proctors for Libelant, by /s/ Nathan Baker.

[fol. 645] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,025
No. 12,031

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased, Libellant-Appellant,

against

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMPSKIBS-AKTIESELSKAB, et al., Respondents,

and against

EL DORADO OIL WORKS, Respondent-Impleaded.

APPENDIX OF DEN NORSKE AFRIKA OG AUSTRALIELINIE *et al.*, AS RESPONDENTS-APPELLEES IN No. 12,025 AND AS RESPONDENTS-APPELLANTS IN No. 12,031—Filed November 7, 1956

On Appeal from the United States District Court for the District of New Jersey

[fol. 647]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 12-55

OLGA SKOVGAARD, Administratrix ad Prosequeudum (sic) of the Estate of Carl E. Skovgaard, deceased, Libelant,

against

The vessel m/v TUNGUS, her boilers, etc., and DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMPSKIBS-AKTIESELSKAB, et al., Respondents,

and

EL DORADO OIL WORKS, Respondent-Impleaded.

NOTICE OF APPEAL—Filed July 18, 1956

Sirs:

PLEASE TAKE NOTICE, that the libelant, Olga Skovgaard, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, having by Notice of Appeal, dated July 9, 1956, appealed to the United States Court of Appeals for the Third Circuit from the amended judgment entered on June 25, 1956, insofar as it dismissed the libel, now therefore the respondents, Den Norske Afrika-og Australielinie Wilhelmsens Dempskibsaktieselskab, (sic) A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, A/S Tankfart VI, hereby appeal to the United States Court of Appeals for the Third Circuit from that part of the amended judgment entered on June 25, 1956, [fol. 648] in the United States District Court for the District of New Jersey dismissing the impleading petition of respondents against respondent-impleaded, El Dorado Oil Works.

Dated: Jersey City, New Jersey, July 16, 1956.

Yours, etc.,

McAleer, Connell & Corridan, Proctors for Respondents, 1 Exchange Place, Jersey City, New Jersey.
By James D. Connell, Partner.

To: William H. Tallyn, Esq., Clerk, United States District Court, District of New Jersey.

Baker, Garber & Chazen, Esqs., Proctors for Libelant, 1 Newark Street, Hoboken, New Jersey.

Wilbur A. Stevens, Esq., Proctor for Respondent-Impleaded, 60 Park Place, Newark 2, New Jersey.

Kirlin, Campbell & Keating, Esqs., of Counsel to Proctor for Respondent-Impleaded, 120 Broadway, New York 5, N. Y.

Filed: July 18, 1956.

[fol. 649] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,025 and No. 12,031

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, Deceased; and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, Deceased, Appellants in No. 12,025,

vs.

The Vessel "M/V TUNGUS," her boilers, engines, tackle, apparel and furniture, and DEN NORSKE AFRIKA-OG AUSTRALIELINE (sic) WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, Appellants in No. 12,031,

and

BARBER STEAMSHIP LINES, INC., Respondents in No. 12,025,

and

EL DORADO OIL WORKS, Respondent-Impleaded.

Present: Biggs, *Chief Judge*, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, *Circuit Judges*.

ORDER SETTING CASES FOR REHEARING EN BANC—
June 27, 1957

It is Ordered that the above-entitled cases be set down for rehearing before the Court en Banc.

By the Court,

Staley, Circuit Judge.

Dated: June 27, 1957

[fol. 650]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,025
No. 12,031

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA E. SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased, Libellant-Appellant,

against

The Vessel M/V TUNGUS, her boilers, etc., and DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMPSKIBSAKTIESELSKAB, et al., Respondents-Appellants,

and against

EL DORADO OIL WORKS, Respondent-Impleaded-Appellee.

On appeal from the United States District Court for the District of New Jersey

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Reargued October 22, 1957

Before Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed December 23, 1957

By STALEY, Circuit Judge.

This admiralty appeal urges upon us the contention that the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1, is broad enough to encompass an action for death based upon a breach of the warranty of seaworthiness.

[fol. 651] Carl E. Skovgaard met his death by suffocation and shock when he slipped and fell into a tank of heated coconut oil aboard the M/V *Tungus*. On December 5, 1952, the *Tungus*, with a cargo of coconut oil, was docked at a pier in navigable waters at Bayonne, New Jersey. The respondent-impleaded El Dorado Oil Works agreed with the owners of the oil cargo in the port deep tank to discharge the oil from the vessel and to store it. Employees of El Dorado began to discharge the oil from the tank around 8:00 p.m. of December 5, 1952. Two officers and two crew members of the *Tungus* remained aboard on duty; the latter two were specifically assigned to assist El Dorado in the discharge operations. The pump owned by El Dorado and used in the operation was apparently in good working order until around 12:15 a.m., December 6. It was then that an air injection nipple burst, causing tons of hot coconut oil to be pumped directly onto the shelter deck of the *Tungus*. It was the crew of the vessel that first discovered the leak and took temporary steps to stop it.

The deceased Skovgaard was a maintenance foreman of El Dorado. He was called from his home shortly after the leak developed to assist in repairing the pump. He arrived on board around 1:25 a.m. As Skovgaard walked aft of the port tank, he stepped on the hatch beams and then attempted to step onto the top of the tank. He slipped on the spill and fell to his death in the hot oil.

The suit was brought by Olga Skovgaard, administratrix of the estate of the deceased. Her libel pleads prin-

cipally two causes of action, one predicated on unseaworthiness, the other on negligence. Both of these causes of action were based upon the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1. After trial was held, the district court dismissed the libel, deciding that an action for death by unseaworthiness did not lie *in the general maritime law*, and as to the negligence question, that the vessel owed no duty to the deceased to clean up the oil spill. 141 F. Supp. 653 (D.C.N.J. 1956). The impleading petition against El [fol. 652] Dorado was dismissed; respondent took a precautionary appeal from this action.

It is an established principle of maritime law that in the absence of statute there is no remedy for wrongful death. The Harrisburg, 119 U.S. 199 (1886); Levinson v. Deupree, 345 U.S. 648, 650 (1953). "Death is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land." Justice Cardozo in Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 371 (1932). In an effort to obviate a plain inequity, Congress in 1920 enacted the Death on the High Seas Act, 46 U.S.C. § 761 et seq., which provided a remedy in admiralty for death occurring more than a marine league from shore. This statute, of course, does not apply to death occurring on territorial waters. Nonetheless, when death occurs on navigable waters within a state whose statutes have created a cause of action for death by wrongful act, admiralty courts will entertain such an action by permitting the state statute to supplement the general maritime law. Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); Just v. Chambers, 312 U.S. 383, 388 (1941).

It follows that whatever right appellant has in seeking redress for the death of Skovgaard must be based upon the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1, which reads as follows:

> "When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an

> action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime."

Appellant urges that unseaworthiness is a "wrongful act, neglect or default" within the meaning of the New Jersey Act.

[fol. 653] We are of the opinion that the district court misconceived the nature of the first cause of action as a death action under general maritime law. It was in fact brought specifically under the New Jersey death act.

In the determination of whether unseaworthiness is such a "wrongful act, neglected or default" as will admit of recovery, we must look to the construction given to the Act by the New Jersey courts. They have held that the Act is in the highest sense remedial, and is entitled to a liberal construction, for its aim was to abolish a harsh and technical rule of the common law. Haggerty v. Central Railroad Co., 31 N.J.L. 349 (1865); Cibulla v. Pennsylvania-Reading Seashore Lines, 25 N.J.Misc. 98, 50 A.2d 461 (1946).

The nature of the conduct which will create liability under the New Jersey statute is of crucial importance. The legislature describes it as "wrongful act, neglect or default." It is presumed that the legislature did not employ useless verbiage and that each word has independent meaning. Ford Motor Co. v. New Jersey Department of Labor and Industry, 5 N.J. 494, 76 A.2d 256, 260 (1950); 82 C.J.S. Statutes § 316 at pages 551-552 (1953). The conduct required to impose liability, therefore, is not limited to that conduct embraced in the historical concept of negligence. The words encompass something more. See, e.g., The H.S., Inc., No. 72, 130 F.2d 341 (C.A.3, 1942); Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 110 A.2d 24, 35-36 (1954).

It is urged that since unseaworthiness is spoken of as a species of liability without fault, it cannot be a "wrongful act, neglect or default" within the meaning of the statute. However, the characterization of unseaworthiness as liability without fault is dangerously deceptive. For urgent and sound reasons of public policy, the law has imposed the absolute duty upon the shipowner to provide a seaworthy

vessel, and liability results only as a consequence of the breach of that duty. If "fault" means negligence alone, of course no fault is required, and to that extent only, the [fol. 654] phrase "liability without fault" is accurate. But to say that one who breaches a duty is without fault is a logical as well as a legal incongruity.

The seaman possesses the legal right of a seaworthy ship. Whenever this legal right is infringed and harm results by reason of the ship being unseaworthy, a "wrong" occurs, whether it be of omission or commission. The Supreme Court of New Jersey has defined "wrongful act" as "any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right." Louis Schlesinger Co. v. Rice, 4 N.J. 169, 72 A.2d 197, 203 (1950). Culpability is not necessary to constitute a wrong. It is the liability-creating quantity of an act which makes it wrongful.

If it be said that the New Jersey act provides redress for tortious conduct alone, we answer that providing an unseaworthy ship is a tort. As was said in Strika v. Netherlands Ministry of Traffic, 185 F.2d 555, 558 (C.A. 2, 1950):

> "It would follow from that analysis that the breach of the 'obligation' to furnish a seaworthy ship is a tort; and that is a result consonant with the historical attitude towards breaches of warranty, which until 1778 had to be sued in tort, and which may still be so treated if the distinction is important."

The New York Court of Appeals has decided in a food poisoning case that the breach of the warranty of fitness for human consumption, imposed by law upon considerations similar to the imposition of the warranty of unseaworthiness, is a "wrongful act, neglect or default" within the New York wrongful death statute. Greco v. S. S. Kresge Co., 277 N.Y. 26, 12 N.E.2d 557 (1938).

The New Jersey statute further refers to the "wrongful act, neglect or default" as one "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury."

This language may admit of alternative interpretation. It [fol. 655] may be construed as defining the nature of the "wrongful act, neglect or default"—i.e., if the conduct would have been actionable by the decedent had he lived, by virtue of that very fact his named beneficiaries would have an action in the event of his death. Or the clause may be construed as a limitation or an additional requirement—i.e., the conduct upon which the suit is based must be such that decedent could have sued had he lived, in addition to being a "wrongful act, neglect or default." In either interpretation, the statutory requirements are met by plaintiff here, for if Skovgaard had merely been injured he could have maintained an action against the vessel on the theory of unseaworthiness, since he was one "within the range of its humanitarian policy." Seas Shipping Co. v. Sieracki, 328 U.S. 85, 95 (1946).

We hold that the failure to provide a seaworthy vessel in the case before us is such "wrongful act, neglect or default" as will allow recovery under the New Jersey wrongful death statute.[1]

The same conclusion was reached by Judge Learned Hand in his dissenting opinion[2] in Gill v. United States, 184 F.2d 49, 57 (C.A.2, 1950):

> "* * * Is a vessel owner liable for a seaman's—or a longshoreman's—death within the territorial waters of a state when it is caused by the unseaworthiness of the vessel? *I have no doubt that the death was*

[1] It is interesting to note that this court has several times held in the determination of the question of laches in an action for personal injuries based upon unseaworthiness that the analogous statute of limitations to be applied is the Pennsylvania two-year statute which uses language substantially similar to the New Jersey Wrongful Death Act. The time limitation is imposed in actions for injury "wrongfully done to the person." Act of June 24, 1895, P.L. 236, § 2, 12 Purdon's Pa. Stat. Ann. § 34. See Kane v. Union of Soviet Socialist Republics, 189 F.2d 303 (C.A.3, 1951), cert. denied, 342 U.S. 903 (1952), and Taylor v. Crain, 195 F.2d 163 (C.A.3, 1952).

[2] The disposition by the majority rendered a decision on this issue unnecessary.

owing to the respondent's 'wrongful act, neglect or default,' as the New Jersey Act uses those words * * *." [Emphasis supplied.]

[fol. 656] The right thus created by the New Jersey statute may be enforced in a court of admiralty, for it is certainly "not hostile to the characteristic features of the maritime law or inconsistent with federal legislation." Just v. Chambers, 312 U.S. at page 388.

In Lee v. Pure Oil Co., 218 F.2d 711 (C.A. 6, 1955), it was held that an action for unseaworthiness would not lie pursuant to the Tennessee wrongful death act. It must be noted, however, that the Sixth Circuit commented that the Tennessee Act allowed recovery only for negligence.

To the extent that Graham v. A. Lusi, Limited, 206 F.2d 223 (C.A.5, 1953), and Mortenson v. Pacific Far East Lines, Inc., 148 F. Supp. 71 (N.D.Cal. 1956) express views on similar statutes of other states contrary to those expressed in this opinion, we are in disagreement with them.

As to the negligence question, the holding of the district court that no duty devolved upon the vessel *Tungus* to clean up the oil spill was predicated upon a finding of fact that the operation of repairing the pump was conducted by El Dorado, and that no evidence indicated that *Tungus* personnel either supervised or controlled the discharge of the oil.

While it may be true that El Dorado supervised the pump repair operation, this would hardly lessen the duty of the vessel to provide a reasonably safe place to work, especially since El Dorado's supervision was not so complete as to exclude crew members from the area. In fact, it was the crew which first discovered the oil leakage and adopted temporary measures to stop it. The chief officer of the *Tungus* testified that it was the custom to offer the assistance of ship personnel to independent contractors unloading the vessel. The personnel of the *Tungus* were well aware of the existence of the oil spill and the danger created by it.

The assimilation by Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) of longshoremen to the position of seamen so far as unseaworthiness is concerned did not take away

[fol. 657] from the longshoreman his accustomed right to recovery on the theory of negligence. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 413-414 (1953). Engaged in the work of unloading the ship, Skovgaard was a business invitee. See concurring opinion of Justice Frankfurter in Pope & Talbot, Inc. v. Hawn, supra at page 416; see also Santamaria v. Longport & Holt Line, 119 N.J.L. 467, 196 Atl. 706 (Err. & App. 1938). It is relevant to note at this point that Skovgaard was called for the purpose of repairing the pump, not to clean up the oil spill. It is alleged that his death was caused by the condition of the deck and tank and not by the instrumentality he intended to repair. Cf. Broecker v. Armstrong Cork Co., 128 N.J.L. 3, 24 A.2d 194 (Err. & App. 1942).

The duty of providing Skovgaard with a reasonably safe place to work, Hawn v. Pope & Talbot, Inc., 198 F.2d 800, 803 (C.A.3, 1952), affirmed, 346 U.S. 406 (1953), would not be lessened even if there were a concurrent duty on the part of Skovgaard's employer. Feinman v. A. H. Bull Steamship Co., 216 F.2d 393 (C.A.3, 1954).

While the New Jersey wrongful death statute adopts the maritime standard of care, it is silent as to available defenses. It is not for us in the first instance, however, but rather for the trier of fact, to determine whether the vessel's duty was breached and to decide factually what defenses, if any, might be available to the respondent. The question of the unseaworthiness of the vessel is likewise one which should be determined initially by the district court.

The judgment of the district court dismissing the libel will be reversed, and the cause will be remanded for further proceedings in conformity with this opinion. The judgment of the district court also dismissed the impleading petition as a consequence of the dismissal of the libel. This will also be reversed inasmuch as the liability of the impleaded defendant cannot be determined until there has been a full and adequate development of the facts.

[fol. 658] HASTIE, *Circuit Judge*, with whom MARIS and KALODNER, *Circuit Judges* join, dissenting.

In one aspect the present libel pictures the shipboard death of libellant's decedent within the state of New Jersey as having resulted, without negligence on the part of the respondent shipowner, from an unseaworthy condition of the vessel. This court now holds that New Jersey, in its Wrongful Death Act, has made a non negligent shipowner liable for death thus caused within the borders of that state. We think this is a mistaken interpretation of the New Jersey law and, therefore, dissent.

The division of the court on this point seems best explained by starting with certain premises and underlying concepts upon which all of us agree. A federal court is here asked to enforce a cause of action, the existence and dimensions of which are determined solely by the law and policy of New Jersey. True, the United States District Court which heard this case, was sitting "in admiralty". But for present purposes this is significant only in that the practice properly followed in that forum is admiralty practice. Thus, the proper form of complaint in this case was a libel in the admiralty style. The shipowners could be reached by attaching the vessel in the classic admiralty manner. But beyond such matters of legal administration, the substantive concepts of admiralty had no effect as law in defining the claim. State law and it alone performed that function. Admiralty was merely the administering forum in a situation in which the maritime law itself did not even provide a cause of action for wrongful death.

The Supreme Court has recently made an explicit and authoritative statement of what a district court does in a situation like this:

> "The United States District Court for the Eastern District of Kentucky heard this suit sitting in admiralty. . . . The District Court adopted and enforced the *obligatio* created by the State of Kentucky not be-
> [fol. 659] cause it sits in Kentucky and responds to the desirability of uniformity in the administration of justice within that State. In the absence of congressional action, the court adopted and enforced the *obli-*

> *gatio* created by Kentucky as it would one originating in any foreign jurisdiction. . . . And it was bound to enforce it as it found it, . . . [except for] procedural niceties. . . ."[1]

For present purposes the most important part of this exposition is the concluding sentence: "it [the federal admiralty court] was bound to enforce it [the state *obligatio*] as it found it. . . ."

Thus, to the extent that state policy has led the state legislature to give dependents rights against one who has caused the death of their provider within the state, a federal court will carry out that policy. Ordinarily the federal court entertains the state created wrongful death claim on its law side. But where the fatal injury has occurred on navigable water, it is accepted practice to entertain the suit on the admiralty side. But, in either event, it is the state law, as defined and construed in the light of state policy, which the federal court must apply.

It is believed that all members of this court accept the above outlined legal theory of what a federal court does and how it should approach its task in a case like this. However, we who dissent think the majority has disposed of this case as if admiralty policies and concepts developed by federal courts in maritime causes were controlling when there is nothing to show that New Jersey has adopted or would adopt these federal maritime concepts of liability to define rights it has created as part of its common law jurisprudence.

The New Jersey Wrongful Death Act, like most prototypes of Lord Campbell's Act, gives dependents a right to [fol. 660] recover for death caused by the "wrongful act, neglect or default" of another. Historically, neither the common law nor any statute of New Jersey seems ever to have utilized the circumstances of unseaworthiness as a basis of imposed liability for non-negligent personal injury. To reach this court's result it is necessary to attri-

[1] *Levinson v. Deupree*, 1952, 345 U.S. 648, 651-2. And see the similar rationalization of Circuit Judge, now Chief Judge, Biggs in Klingseisen v. Constanzo Transp. Co., 3d Cir. 1939, 101 F.2d 902, 903.

bute to New Jersey a purpose to make a novel piecemeal borrowing of maritime concepts.

We call this borrowing novel and piecemeal advisely. (sic) It has long been a peculiar and characteristic feature of admiralty law that a ship is responsible to indemnify members of its company for injuries caused by the unseaworthiness of the vessel.[2] But historically this responsibility covered only the members of the crew.[3] Moreover, a crewman's rights did not survive him. It is only in recent years, long since the enactment of the New Jersey Wrongful Death Act, that admiralty case law of the United States courts has extended the seaman's protection against unseaworthiness to longshoremen and other persons not members of the crew.[4] Thus, to construe the New Jersey statute as applicable to the present case, requires not only the inference that the New Jersey statute was intended to create rights in accordance with admiralty concepts of liability as they existed when the legislation was passed, but also that subsequent modifications of admiralty concepts by the federal courts routinely become a part of New Jersey policy and law.

Moreover, although the majority do not face the problem here, the question must arise whether under the prevailing analysis New Jersey accepts the unseaworthiness concept alone in defining the statutory rights it has created, or whether other admiralty doctrines, notably that of comparative negligence, are also part of the state created right. [fol. 661] This court and others have from time to time rejected the idea that state wrongful death causes incorporate the admiralty comparative negligence concept.[5] If

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[2] *The Osceola*, 1903, 189 U.S. 158.

[3] See Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 1954, 39 CORN. L.Q. 381, 408.

[4] *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85 (longshoreman); *Pope & Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406 (carpenter working on a ship).

[5] *Curtis v. A. Garcia Y Cia., Ltda.*, 3d Cir., 1957, 241 F.2d 30; *Klingseisen v. Costanzo Transp. Co.*, 3d Cir., 1939, 101 F.2d 902; *Byrd v. Napoleon Ave. Ferry Co.*, D.C.E.D.La., 1954, 125 F. Supp. 573, *aff'd per curiam*, 5th Cir., 1955, 227 F.2d 958, *cert. denied*, 351 U.S. 925; *Feige v. Hurley*, 6th Cir., 1937, 89 F.2d 575.

the fact that comparative negligence is a liability defining concept peculiar to maritime law prevents its implied incorporation in a state created death cause, the same seems equally true of the maritime unseaworthiness concept.

Thus, even if the New Jersey cases provided no guide for the interpretation of the Wrongful Death Act in situations of this kind the conclusion reached by the majority would seem illogical and for that reason unwarranted. We are the more confident of this view since several federal and state courts interpreting death statutes of other states have been unable to find therein any satisfactory rationale for the use of the unseaworthiness concept in defining the causes of action which these state statutes have created.[6]

But we think the New Jersey cases are instructive and helpful. They show rather clearly the way in which the New Jersey courts understand their wrongful Death Act. As a general proposition, common law concepts of tort, with negligence a prerequisite to recovery, are read into the New Jersey statute by the courts of that state. If a fatal accident occurs on land or non-navigable water within New Jersey, or if anyone other than the shipowner is sued for a fatal accident on a ship in navigable New Jersey water, there is no question that New Jersey policy and law require a showing of lack of due care to establish a claim under the Wrongful Death Act.[7] It would be strange for New Jersey to rule that under the general wording of the [fol. 662] statute, there is a different and more stringent duty on shipowners in navigable water. At least two cases indicate the absence of any such special onerous responsibility on shipowners.

In *Santamaria v. Lamport & Holt Line, Ltd.*, E.&A. 1938, 119 N.J.L. 467, 196 Atl. 706, an action under the New Jersey Wrongful Death Act, a shipowner was sued for the death of a stevedore who, while unloading a vessel, was

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[6] *Lee v. Pure Oil Co.*, 6th Cir., 1955, 218 F.2d 711; *Graham v. A. Lusi, Ltd.*, 5th Cir., 1953, 206 F.2d 223; *Mortenson v. Pacific Far East Lines, Inc.*, D.C.N.D. Cal., 1956, 148 F. Supp. 71; *Babin v. Lykes Bros. S.S. Co.*, 94 So. 2d 715 (La. 1957).

[7] *E.g., Stewart v. Norton*, 1951, 6 N.J. 591, 80 A.2d 111; *DeCicco v. Marlou Holding Co.*, E.&A. 1948, 137 N.J.L. 186, 59 A.2d 227.

thrown into the hold by the upending of a board constituting part of a hatch cover. In *Moran v. Moore-McCormack Lines*, 1944, 131 N.J.L. 332, 35 A.2d 415, a personal injury case, one line of proof indicated that a stevedore's injury had been caused by a latent defect in a skid which the shipowner had provided for the unloading and transferring of cargo. In both cases the New Jersey courts emphasized the absence of liability unless negligence on the part of the shipowner should be proved. True, there was no discussion of the unseaworthiness of vessel or gear as a possible basis of liability without fault. Still if the substantive law of New Jersey as applicable to wrongful death causes recognizes an absolute duty of a shipowner to supply a longshoreman with a seaworthy vessel and gear, it is very difficult to believe that neither court nor counsel would advert to this legal basis of liability in cases so obviously appropriate for its invocation. It should be added that we have found no mention of this possibility in any other New Jersey case.

We think it clear that in administering their Wrongful Death Act, whether the injury has been on land or water and whether the defendant has been a shipowner or anyone else, the New Jersey courts have consistently defined and confined liability within common law concepts of negligent or intentional wrong. For a federal court to say now that the law of New Jersey is otherwise is to rule in derogation of the whole history of New Jersey litigation interpreting a New Jersey statute as based on common law concepts.

Finding no New Jersey cases helpful, the majority point to decisions of several other state courts holding that [fol. 663] death caused by breach of warranty of quality of goods may be actionable under their death statutes.[8] But these cases illustrate the very point we are stressing in dissent. In these states there are statutes or decisions, or both, clearly showing the state policy and legal rule making such adulteration of foods an actionable wrong. It then is logical to view death caused by such violation of state policy and requirements as actionable under the local

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[8] *Greco v. S.S. Kresge Co.*, 1938, 277 N.Y. 26, 12 N.E.2d 557, and see cases collected in 115 A.L.R. 1020.

Wrongful Death Act. It is the absence of any such New Jersey concept of unseaworthiness as an actionable wrong which requires an opposite result in this case.

Finally, the majority find support for their view in the fact that the New Jersey statute in terms comprehends fatal injury "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury". This provision is present in almost all death statutes of this type and has been universally considered to be a limiting concept. See PROSSER, TORTS, § 105 (2d ed. 1955). The liability defining part of the statute is found in the words "wrongful act, neglect or default". The limiting words which follow serve only to make sure that defenses which would have been available against the decedent, had he lived, shall be available against the wrongful death claim. We think these limiting words have no bearing upon our present problem whether a maritime type of liability without fault is created by the preceding phrase, "wrongful act, neglect or default".

For the foregoing reasons we think the New Jersey law provides no cause of action for death resulting from unseaworthiness without negligence. Judge Maris and Judge Kalodner would go farther and say that the result of the majority would be incorrect even if New Jersey did incorporate the unseaworthiness concept of admiralty. In this case the district court found as a fact that the decedent knew of the presence of the oil slick which caused him to [fol. 664] slip and fall to his death. Indeed, the record shows beyond question that this condition was apparent and obvious. In addition, decedent boarded the ship to repair the very defective valve which had caused the oil to leak and spread over the deck. In these circumstances Judge Maris and Judge Kalodner would hold, relying upon *Bruszewski v. Isthmian SS Co.*, 3d Cir., 1947, 163 F.2d 270, cert. denied 333 U.S. 828, that, even applying concepts of the maritime law, a shipowner does not warrant, to one so situated and informed as this workman, that the deck is free of oil or of the obvious hazards incidental to the presence of that substance. However, I am content to rest my dissent solely upon the construction and application of the New Jersey law, without examining the

reach of the unseaworthiness doctrine, if maritime law were applicable.

This case has a second aspect. The libellant undertook to prove that, quite apart from unseaworthiness, the shipowner was responsible for actionable negligence on the part of the ship's personnel in not providing the decedent with a reasonably safe place to work. On the evidence and the findings we think the defendant was entitled to judgment on this branch of the case.

Here again the majority seem to apply federal admiralty concepts to define a state created death claim. But the question to be decided is the extent of the duty which New Jersey law imposes upon the possessor of a place to provide a safe place to work for employees of independent contractors who entered the place as business invitees. The fact that the place in this case is a ship is incidental and irrelevant for present purposes.

We have already pointed out that in this case it has been established as a fact that the dangerous condition was obvious and actually known to the decedent. In *Newbury v. American Stores Co.*, 1935, 115 N.J.L. 604, 607, 180 Atl. 875, 876, the Court of Errors and Appeals stated the rule of New Jersey law which is controlling in such circumstances: "It is axiomatic that the rule that one who enters [fol. 665] store premises by invitation may lawfully assume that the proprietor has performed his duty to render the premises reasonably safe, is not applicable where the invitee knows the contrary to be the case." We think *Broeker v. Armstrong Cork Co.*, E.&A. 1942, 128 N.J.L. 3, 24 A.2d 194, turns on the same principle that a danger which is obvious to the business visitor does not constitute a breach of duty to provide him with a safe place to work. Indeed, this appears to be a principle which is generally accepted in the law of torts.[9]

In these circumstances it is immaterial whether admiralty law, in cases to which it is applicable, may impose a more stringent duty. New Jersey tort principles are controlling here, and under them, on the admitted facts, the person in

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[9] TORTS, RESTATEMENT, §§ 340, 343; *Ambrose v. Moffat Coal Co.*, 1948, 358 Pa. 465, 58 A.2d 20. *McCreerey v. Westmoreland Farm Bureau Co-Operative Ass'n.*, 1947, 356 Pa. 567, 55 A.2d 399.

possession of the place of injury was not responsible for death caused by a condition of which the invitee was fully cognizant.

In our view the judgment below should be affirmed.

[fol. 666]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,025 and 12,031

Olga Skovgaard, Administratrix ad prosequendum of the Estate of Carl E. Skovgaard, deceased; and Olga Skovgaard, Administratrix of the Estate of Carl E. Skovgaard, deceased, Appellant in No. 12,025,

vs.

The Vessel "M/V Tungus", her boilers, engines, tackle, apparel and furniture,

and

Den Norske Afrika-OG Australielinie Wilhelmsens Dampskibsaktieselskab, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, A/S Tankfart VI, Appellants in No. 12,031,

and

Barber Steamship Lines, Inc.,

and

El Dorado Oil Works.

On appeal from the United States District Court for the District of New Jersey.

Present: Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

JUDGMENT—December 23, 1957

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case dismissing the libel and the impleading petition be, and the same is hereby reversed, with costs, and the cause remanded for further proceedings in conformity with the opinion of this Court.

[File endorsement omitted]

[fol. 667] Clerk's certificate to foregoing transcript (omitted in printing).

[fol. 668]

SUPREME COURT OF THE UNITED STATES

No. 877—October Term, 1957

The Vessel M/V "Tungus", her Boilers, etc., and Den Norske Afrika-OG Australielinie, et al., Petitioners,

vs.

Olga Skovgaard, Administratrix ad prosequendum of the Estate of Carl E. Skovgaard, Deceased, et al.

ORDER ALLOWING CERTIORARI—June 9, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 955.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. [redacted] 443

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

against

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

and against

EL DORADO OIL WORKS,

Respondent-Impleaded.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Supreme Court of the United States

October Term, 1957

No. .....

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBS-AKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

against

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

and against

EL DORADO OIL WORKS,

Respondent-Impleaded.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on December 23, 1957.

Opinions of the Courts Below

The opinion of the United States District Court for the District of New Jersey (Alfred E. Modarelli, U. S. D. J.), dismissing the libel is reported at 141 F. Supp. 653, is set forth on pages 635a-642a of libelant-appellant's appendix in the Court of Appeals and is also set out in Appendix A to this petition at pages 1a-9a.

The majority opinion of the United States Court of Appeals for the Third Circuit (Chief Judge Biggs and Circuit Judges Goodrich, McLaughlin and Staley) and the minority opinion (Circuit Judges Maris, Kalodner and Hastie) is reported at — F. 2d — and is set out in Appendix B to this petition (pages 10a-26a). The judgment of the United States Court of Appeals is also set forth in Appendix B to this petition (pages 27a-28a).

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 23, 1957.

The jurisdiction of this Court is invoked under Title 28 U. S. Code, Section 1254(1).

Questions Presented

1. Whether a federal court may engraft concepts of liability peculiar only to the federal maritime law upon the wrongful death act of a state in the absence of any state statutes or authorities incorporating such concepts into that act?

2. Whether a federal court may attribute to the legislature of a state an *in futuro* intent to incorporate into the wrongful death act of that state substantive provisions of the federal maritime law when there is total lack of evidence of such intent on the part of that legislature either at the time of enactment or at any later date?

3. Whether, in any event, a shipowner owes a warranty of seaworthiness to a repairman, employed by an independent contractor, as to an obvious condition aboard the vessel created by a failure of the contractor's equipment, which very equipment he comes aboard to repair?

4. Whether a shipowner is under a duty to provide a safe place to work to a repairman employed by an independent contractor with respect to obvious conditions created aboard the vessel by the failure of the contractor's equipment, when the repairman comes aboard the vessel to repair that equipment with full knowledge of the facts?

5. Whether the widow of a shoreside repairman killed aboard a vessel in state waters may recover for both unseaworthiness and negligence, whereas the widow of a seaman killed under identical circumstances would be limited to a negligence claim only?

The Statute Involved

The libellant sued in the United States District Court for the District of New Jersey to recover damages under the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1 through 6, the relevant section of which read as follows:

> "2A:31-1. When Action Lies
>
> When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.
>
> • • •

Statement of Facts

The libelant sued in the United States District Court to recover damages under the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1, *et seq.*, for the death of her husband, which occurred aboard m/v Tungus on December 6, 1952, while that vessel was moored at a pier in Bayonne, New Jersey. The District Court entertained the suit under the authority of *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242, 42 S. Ct. 89, 66 L. Ed. 210 (1921) and *Just* v. *Chambers*, 312 U. S. 668, 61 S. Ct. 687, 85 L. Ed. 903 (1941).

Taken chronologically, the facts leading up to the suit in the District Court were as follows:

In October, 1952, m/v Tungus, a cargo vessel owned by the respondents, was in the Philippine Islands, where coconut oil in bulk was loaded by the shipper into two deeptanks located in No. 3 shelter deck. The contract for the carriage of this coconut oil specified that the oil was to be discharged at the sole risk and expense of the consignee, who was also obligated to provide all necessary equipment for discharge.

Upon the arrival of the vessel in New York in December, 1952, the respondent impleaded, El Dorado Oil Works, was instructed by the consignee of the oil to discharge the contents of one of the deeptanks into El Dorado's storage facilities in Bayonne, New Jersey. The vessel arrived at El Dorado's pier in Bayonne, New Jersey, in the late afternoon of December 5, 1952.

Subsequently an electric discharging pump owned by El Dorado was lowered into the shelter deck and the El Dorado personnel connected their suction and discharge hoses. The El Dorado pump crew started discharging at about 8 P. M. Shortly after midnight, in the morning of December 6, 1952, one of the officers of the vessel, while making a routine tour of the decks, looked down into the open shelter deck and saw that El Dorado's pump had burst

and that tons of hot, liquid coconut oil were being pumped directly into the shelter deck. None of the El Dorado pump crew were then on board the vessel, although the respondent-impleaded, El Dorado, admitted that one member of its pumping crew was required to maintain a constant watch on the pump.

As a result of the burst coconut oil covered the entire area of No. 3 shelter deck, including the top of the two tank lids. The tank being discharged was partly open, for its oblong cover had been lifted, rotated 90° and then lowered on top of the tank coaming. This had been necessary in order to permit the pump assembly to be lowered into the tank itself, once the distance between the pump and the oil level became too much for the pump. Two El Dorado employees replaced the broken fitting on the pump after having cleaned the spilled oil from around the immediate working area of the pump, but they were unable to regain pumping suction.

Carl Skovgaard, the deceased, a maintenance foreman employed by El Dorado, was called from his home in the middle of the night by the other El Dorado employees on the job. He was told about what had happened, and was asked to come aboard the ship to assist in restarting the pump. Deceased left his home, and shortly later boarded the vessel. Deceased first looked down into the open shelter deck from the main deck and shouted instructions to his pump crew. After several minutes he went down into No. 3 shelter deck to supervise the work.

In moving from the foot of the ladder leading from the main deck to the shelter deck deceased walked through the area over which the oil had been spilled, and as he attempted to step up on top of the tank lid to get to the pump he slipped on the oil spill and fell to his death into the partially opened tank.

Skovgaard, the deceased, had checked the pump on the morning of December 5, 1952, just before the arrival of the

vessel and he was "satisfied that she was in good working condition" (507a). The employees of El Dorado agreed that the pump had failed due to "normal vibration" (480a; 562, 3a). No requests had been made by the deceased or any other El Dorado employee to the officers of the vessel after the oil spill to have the conditions in the No. 3 shelter deck altered or remedied in any way.

The suit came on for trial in the United States District Court for the District of New Jersey before Judge Modarelli in November, 1955. On June 11, 1956 Judge Modarelli filed an opinion holding the respondents not liable for the death of the deceased. After judgment was entered, libelant filed a notice of appeal to the United States Court of Appeals for the Third Circuit.

The appeal was first argued in the United States Court of Appeals for the Third Circuit on February 8, 1957 before Circuit Judges McLaughlin, Staley and Hastie. On June 27, 1957 the Court of Appeals handed down an order calling for reargument of the appeal before the Court *en banc*.

On October 22, 1957 the appeal was reargued before the full bench of seven Judges.

On December 23, 1957 the opinion of the Court was filed and judgment entered. The majority of four, consisting of Chief Judge Biggs and Circuit Judges Goodrich, McLaughlin and Staley called for a reversal of the judgment of the District Court on the grounds that the respondents owed a warranty of seaworthiness to the deceased and were in addition under a duty to provide him with a safe place to work. The dissenting minority of three, consisting of Circuit Judges Maris, Kalodner and Hastie felt that the majority of the Court had injected into the New Jersey Wrongful Death Act liability defining concepts peculiar only to and borrowed from the federal maritime law, and that since the federal maritime law afforded no remedy (the deceased having died in state waters) such borrowing was improper. It was also the opinion of the minority

that under the New Jersey cases the seaworthiness of the vessel could not have been warranted to the deceased and there could have been no breach of duty to the respondents to provide the deceased with a safe place to work, since the danger was obvious to the deceased and since he came aboard to repair and restore to operation the very pump which had caused the oil spill.

Reasons for Granting the Writ

1. The decision of the United States Court of Appeals for the Third Circuit in the instant case is in conflict with decisions of the Supreme Court of the United States such as *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953) and *Kernan* v. *American Dredging Co.*, — U. S. —, No. 34, October Term, 1957, decided February 3, 1958, on the source of a shipowner's liability in terms of unseaworthiness.

The United States Court of Appeals for the Third Circuit, by the majority opinion of December 23, 1957, has held that the right to recover for unseaworthiness is a right conferred by the New Jersey Wrongful Death Act, which by its terms is limited to a right to recover for "wrongful act, neglect or default". In so doing the Court of Appeals, under the guise of interpreting statutory language of New Jersey, has incorporated and given effect to a right having roots only in the federal maritime law. The right is nowhere mentioned in the legislative history of the enactment of the Wrongful Death Act, in the statute or in decisions of the courts of that state.

This Court has held that the right to recover for unseaworthiness derives from the federal maritime law. This Court has also held that unseaworthiness is neither a negligence nor a fault concept. In *Seas Shipping Co.* v. *Sieracki*, *supra*, Mr. Justice Rutledge wrote at 328 U. S. 92 that the idea that the right to recover for unseaworthiness was

a liability founded in negligence was "erroneous", and later, in further defining the nature of unseaworthiness, wrote as follows at page 94:

> "It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing service imposes, the liability is neither limited by conceptions of negligence nor contractual in character".

In *Boudoin* v. *Lykes Bros. S.S. Co. Inc.*, 348 U. S. 336, 339, 75 S. Ct. 73, 99 L. Ed. 642 (1955) Mr. Justice Douglas wrote that if his vessel were not seaworthy an owner was liable "irrespective of any fault on his part."

In *Pope & Talbot, Inc.* v. *Hawn, supra,* an injury case, Mr. Justice Black commented upon the origins of the right to recover for unseaworthiness in the following terms (346 U. S. 409):

> "His right of recovery for unseaworthiness and negligence is rooted in federal maritime law."

In a concurring opinion Mr. Justice Frankfurter wrote at page 415:

> "The right of seamen to recover for unseaworthiness is peculiarly a cause of 'admiralty and maritime jurisdiction', 1 Stat. 73, 77. The right is in the nature of liability without fault for which contributory negligence is not a bar to recovery although it may be relevant in assessing the damages. • • • We should not commingle federal admiralty and state common law and should not engraft onto the federally created right to recover for unseaworthiness a common-law defense foreign to that right".

Most recently in *Kernan* v. *American Dredging Co., supra,* decided by this Court on February 3, 1958, Mr. Justice Brennan wrote:

> "But the remedy for unseaworthiness derives from the general maritime law, and that law recog-

nizes no cause of action for wrongful death whether occasioned by unseaworthiness or by negligence."

2. The decision of the United States Court of Appeals for the Third Circuit, in giving libelant a right to recover based on unseaworthiness, is in conflict with decisions of this Court, such as *The Harrisburg,* 119 U. S. 199, 7 S. Ct. 140, 30 L. Ed. 358 (1886), *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210 (1921), *Just* v. *Chambers,* 312 U. S. 668, 61 S. Ct. 687, 85 L. Ed. 903 (1941), *Garrett* v. *Moore-McCormack,* 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942) and *Levinson* v. *Deupree,* 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953). These cases state the obligation of a federal court to follow the law of the state, whose statute supplies the right to recovery.

On the same issue the decision is in conflict with the decisions of the United States Court of Appeals for the Fifth Circuit in *Graham* v. *A. Lusi Ltd.,* 206 F. 2d 223 (C. A. 5, 1953) and *Byrd* v. *Napoleon Avenue Ferry Company,* 125 F. Supp. 573 (E. D. La., 1954), aff'd on opinion below, 227 F. 2d 958 (C. A. 5, 1955), cert. den. 351 U. S. 925, 76 S. Ct. 783, 100 L. Ed. 601 (1956), and the decision of the United States Court of Appeals for the Sixth Circuit in *Lee* v. *Pure Oil Company,* 218 F. 2d 711 (C. A. 6, 1955).

There is no dispute that the libelant in the instant matter seeks redress for the death of her husband solely under the New Jersey Wrongful Death Act, N. J. S. A. 2A: 31-1, *et seq.,* which is New Jersey's Lord Campbell's Act. Nor is there any dispute that, since the deceased died in navigable waters of New Jersey, the New Jersey Wrongful Death Act provides the sole basis for a recovery by the libelant. It is an established principle that there is no remedy for wrongful death under the general maritime law. *The Harrisburg, supra; Levinson* v. *Deupree, supra; Kernan* v. *American Dredging Co., supra.*

Nor does there appear to be any dispute about the power of a United States Court, sitting in admiralty, to entertain

an action under the wrongful death act of a state for a death, such as occurred in the instant matter. *Western Fuel Co.* v. *Garcia, supra, Just* v. *Chambers, supra.*

The United States Court of Appeals for the Third Circuit has, however, departed from standards established by this Court in that it has applied liability-defining concepts peculiar only to the general maritime law in a case where the sole right is provided by state law. As such it conflicts with numerous rulings of this Court.

In *The Harrisburgh, supra,* this Court ruled as early as 1886 that a United States District Court, in admiralty, which adopts a state statute as a rule of right to be administered within its own jurisdiction, must take that right subject to the limitations which have been established by the state.

That case formed the keystone for the later decision of this Court in *Western Fuel Co.* v. *Garcia, supra,* in 1921, where it was again held that where a libel for damages for wrongful death was filed in the District Court seeking recovery under the laws of California, the District Court was bound to enforce the limitations upon the right, which would have been enforced if the suit had been brought in the courts of that state (257 U. S. 242). The result obtained in the District Court should not vary from that which would obtain if the suit under the State statute had been litigated in the state Court.

This Court again touched on the same subject in 1941 in *Just* v. *Chambers, supra,* when Mr. Chief Justice Hughes recognized the authority of the various states to create rights and liabilities with respect to conduct within their own borders as long as the state action did not run counter to federal laws or the essential features of any exclusive federal jurisdiction. Here again this Court ruled that the end result should be the same as though the suit had been instituted in one of the courts of the State of Florida

rather than in a United States District Court. The United States District Court was bound to give effect to the substantive provisions of the law of Florida.

Both sides of the coin were referred to by this Court in 1942 in *Garrett* v. *Moore-McCormack Co. Inc., supra,* when Mr. Justice Black wrote as follows at 317 U. S. 245:

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with a substantive law of the State."

Finally, in 1952 in *Levinson* v. *Deupree, supra,* this Court reiterated the same principle in an action brought in a United States District Court under the wrongful death act of Kentucky. Mr. Justice Frankfurter wrote at 345 U. S. 651:

> "Similarly, when the statute, as it does in this case, vests the right of action in 'the personal representative of the decedent,' it is not for the forum provided by another jurisdiction to vest the right elsewhere: such a forum must look to the local law to determine the meaning of the phrase 'personal representative'."

The foregoing decisions are the logical converse of numerous decisions of this Court to the effect that state courts, which sit upon actions under the federal maritime law, must achieve uniform results across the country, uneffected by local views or local law. This Court has declared the necessity for dominance of admiralty principles in actions in vindication of rights arising under the federal maritime or admiralty law. *Garrett* v. *Moore-McCormack Co., supra, Southern Pacific Co.* v. *Jensen,* 244 U. S. 205,

37 S. Ct. 524, 61 L. Ed. 1086; *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834.

The decision of the United States Court of Appeals for the Third Circuit is in conflict with all of the foregoing in that it has applied federal maritime law in a case where the federal maritime law provides no right to recover. The result achieved by the United States Court of Appeals bears no relation whatsoever to the results achieved by the courts of New Jersey in cases involving the New Jersey Wrongful Death Act.

The decision of the Court of Appeals is in conflict with the decision of the Fifth Circuit in *Graham* v. *A. Lusi Ltd.*, *supra*, an action to recover under the Florida Wrongful Death Act, Title 43, Chapter 768, Section 1, F. S. A. Section 768.01, where Judge Borah wrote at 206 F. 2d 225 that:

> "The statute must be applied in admiralty just as if the suit had been brought in the state courts, and any defenses which are open to the appellee under the jurisprudence of the state, if successfully maintained, will bar recovery under the libel."

To the same effect is the decision of that Court in *Byrd* v. *Napoleon Avenue Ferry Co.*, *supra*.

In the same vein is the decision of the United States Court of Appeals for the Sixth Circuit in *Lee* v. *Pure Oil Company*, *supra*, an action under the Wrongful Death Act of Tennessee, Title 20 Tennessee Code, Section 607, wherein it has held that the libelant had to take the Tennessee death statute as she found it, irrespective of whether the suit were brought in the District Court or in the state court.

3. The decision of the Court of Appeals which is the subject matter of this petition is also in conflict with these decisions of the United States Courts of Appeals for the

Fifth and Sixth Circuits (*Graham* v. *A. Lusi Ltd., supra,* and *Lee* v. *Pure Oil Company, supra*), on the interpretation of the liability defining concept known as "unseaworthiness".

In ruling upon wrongful death acts of other states having similar language, the United States Courts of Appeals for the Fifth and Sixth Circuits have held that no right to recovery for unseaworthiness was given by those state statutes.

Graham v. *A. Lusi Ltd., supra,* was a suit brought to recover under the Florida Wrongful Death Act, Title 43, Chapter 768, § 768.01 F. S. A., where the right to recover is predicated upon the "wrongful act, negligence, carelessness or default of any individual or individuals * * * (or by the wrongful act, negligence, carelessness or default of any ship, vessel, boat or persons employed thereon), * * * ". Judge Borah held at 206 F. 2d 225 that the trial court was correct in holding that unseaworthiness without negligence would not afford the libelant a cause of action.

In *Lee* v. *Pure Oil Company, supra,* the United States Court of Appeals for the Sixth Circuit passed upon an action under the Tennessee Death Statute, Title 20, § 607 of the Tennessee Code, which uses the words "wrongful act, omission, or killing by another". Upon the trial in the District Court the plaintiff unsuccessfully attempted to amend the complaint so as to allege a cause of action based upon unseaworthiness. The Court of Appeals for the Sixth Circuit affirmed the Trial Court's rejection of the request for a charge on unseaworthiness and held that the right conferred by the Tennessee Death Statute was to recover only in the event of negligence 218 F. 2d 718.

The majority and dissenting opinions of the United States Court of Appeals for the Third Circuit in the instant matter recognized the conflict.

The majority opinion of the United States Court of Appeals for the Second Circuit's decision in *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association*, — F. 2d —, C. A. 2, No. 94, October Term, 1957, decided January 10, 1958, a copy of which opinion is annexed to this petition as Appendix C, recognized the conflict, as well, but was "not persuaded".[1] The *Halecki* case cites *Skovgaard* as authority for the proposition that unseaworthiness is a basis for recovery under the New Jersey Wrongful Death Act, and then goes even further by applying the federal maritime law rule of comparative negligence, even though the New Jersey Courts have held that contributory negligence of the deceased in an action under the Wrongful Death Act is a total bar to recovery.

4. This decision of the United States Court of Appeals for the Third Circuit is in conflict with decisions of the Courts of the State of New Jersey, not only on the question of the scope of the liability under the New Jersey Wrongful Death Act, but also on the question of the liability of an owner for conditions on his premises as to which the invitee was fully cognizant.

The "interpretation" of the New Jersey Wrongful Death Act, holding that the words "wrongful act, neglect or default" are synonomous with "unseaworthiness" is an exercise of judicial legislation by the federal court which finds no basis in the statutes or the decisions of the Courts of the State of New Jersey. No specific authority for such an interpretation was found by the Court. Significantly, the majority bench in the United States Court of Appeals for the Second Circuit in *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association*, *supra*, likewise found no authoritative basis

[1] Counsel for petitioners has been informed by counsel for the defendants in the *Halecki* case that it is their intention to file a petition for a Writ of Certiorari in the Supreme Court of the United States, which petition would be due in the second week of April, 1958.

for such a holding in the decisions of the Courts of the State of New Jersey. The only excuse for the interpretation is the alleged need for a "liberal construction" of the act, since the professed aim of the act was "to abolish a harsh and technical rule of the common law". No case in the New Jersey Courts has been found in which liability under the New Jersey Wrongful Death Act was predicated upon a warranty or a condition not necessarily attended by any act of omission or commission. The warranty of unseaworthiness is a unique characteristic of the federal maritime law. As has been stated by this Court in decisions cited earlier in this petition, negligence plays no part in the right to recover for unseaworthiness.

In *Hagerty* v. *Central R. R. Co.*, 31 N. J. L. 349, 350 (1865), a leading case in New Jersey on its Wrongful Death Act, and one cited in the *Skovgaard* opinion, the Chief Justice referred to the "wrongful act, neglect or default" in the Act as imposing a general liability for what was described by him as "misfeasance". In *Kuzmiak* v. *Brookchester, Inc.*, 33 N. J. Sup. 575, 588, 111 A. 2d 425 (1955), the New Jersey Superior Court, Appellate Division, stated that:

> "'active wrongdoing', 'affirmative negligence' and 'misfeasance' have the same essential connotation; and, in short, may be said to be negligent acts of commission."

In the face of a total lack of evidence of intent, the United States Court of Appeals for the Third Circuit has ascribed to the legislature of the State of New Jersey an intention to include the right to recover for unseaworthiness in the right to recover for a "wrongful act, neglect or default", even though the New Jersey Act with the original words "wrongful act, neglect or default" was enacted on March 3, 1848, when persons in the category of this deceased were most certainly not entitled, even under the then rulings of our federal courts, to a warranty of seaworthiness.

As suggested by the dissenting opinion of Circuit Judge Hastie in the instant matter, only bedlam will result if we are to ascribe to a state legislature an intention to incorporate future interpretations given to federal maritime law by our admiralty courts. The decision of the United States Court of Appeals for the Third Circuit in the instant matter is wholly unsupported by the law of the state of New Jersey in a situation where the laws of the State of New Jersey provide the sole right to recovery.

The end result achieved by the Court of Appeals is rather startling in another respect. Skovgaard, we are told, would have been entitled to a warranty of seaworthiness if he had only been injured, because he was doing work formerly done by seamen. *Seas Shipping Co.* v. *Sieracki, supra.* But by this curious decision the Court of Appeals has given to the widow of Skovgaard rights far greater than the rights of the widow of a deceased seaman. This Court has held that the widow of a seaman killed in the waters of a state is limited to a negligence cause of action under the Jones Act (46 U. S. Code Section 688), and cannot recover for unseaworthiness under the federal maritime law or even under a state death act. *Lindgren* v. *United States,* 281 U. S. 38, 50 S. Ct. 207, 74 L. Ed. 686 (1930). If Skovgaard's right to recover for unseaworthiness *derives* from the rights of seamen, we fail to see why the rights of his widow should exceed the rights of the widow of a seaman killed under the same circumstances.

5. The holding of the United States Court of Appeals in the instant case flies directly in the teeth of decisions of the courts of New Jersey, which hold that no duty is owed by the owner of the premises to an invitee with respect to a dangerous or defective condition when the invitee has full knowledge of the defect. Furthermore the New Jersey Courts have held that one who engages an independent contractor is under no duty to guard the employees

of that independent contractor against the very dangers which arise from the nature of their work.

In *Broecker, Admx.* v. *Armstrong Cork Company,* 128 N. J. L. 3, 24 A. 2d 194 (1942) an action was brought to recover damages for the death of plaintiff's decedent who had been killed as a result of a fall from a defective roof, which the decedent, as an employee of a roofing company was engaged in replacing. Non-suit was granted by the presiding Judge in the Supreme Court, and he was affirmed by the Court of Errors and Appeals in a unanimous opinion delivered by Judge Case. Judge Case held that defendant was under no duty to provide the deceased with a safe place in which to work. He wrote:

> "Before recovery may be had a duty must exist in point of law and a failure in that duty must be proved in point of fact. It is hard to see how the person who engages an independent contractor is under any duty to guard the servants of the latter against the very danger that arises from their work."

The record shows that the deceased was responsible for checking the condition of the pump before the job was started, the failure of the pump and the resulting oil spill were the responsibility of the deceased. Deceased was a maintenance man for an oil company. Pumps and oil were his bread and butter.

In *Mergel* v. *Colgate-Palmolive-Peet Co.,* 41 N. J. Super. 372, 125 A. 2d 292 (1956), the Superior Court cited with approval the foregoing language from the *Broecker* opinion, and added at page 379:

> "It has long been the law of the State that an employee assumes all those risks which are ordinarily incidental to his employment as well as those dangers which are plain and obvious to a person of ordinary understanding and judgment [citations]".

In the instant matter the record shows beyond question that the oil spill created by El Dorado's pump in the 'tween

deck of m/v Tungus was apparent and obvious and known to the decedent. Under such conditions the Courts of New Jersey would deny recovery to this libelant. No different result should obtain because the forum was a federal court and not one of the courts of the State of New Jersey.

In further support of the stand taken by the Courts of the State of New Jersey on this point we refer to the decision of the Supreme Court of the State of New Jersey in *Lokar* v. *Church of the Sacred Heart*, 24 N. J. 549, 133 A. 2d 12 (1957). At page 553 the Court held:

> "The possessor of land is not liable to one rightfully on the premises for injuries attributable to dangers that are obvious or as well known to the user of the lands as to the possessor."

Again, we have the case of *Newbury* v. *American Stores Co.*, 115 N. J. L. 604, 180 Atl. 875 (1935), a decision of the Court of Errors and Appeals of the State of New Jersey referred to by Judge Hastie in his dissenting opinion in the instant matter. In ruling on the obligation of the owner of premises to invitees for defective conditions of the premises the Court of Errors and Appeals wrote:

> "It is axiomatic that the rule that one who enters a store premises by invitation may lawfully assume that the proprietor has performed his duty to render the premises reasonably safe, is not applicable where the invitee knows the contrary to be the case."

The foregoing decisions should be binding in this case.

Under the facts of this case it is an anomaly to say that the owner of m/v Tungus warranted the seaworthiness of the 'tween deck of m/v Tungus with respect to the oil spill to the deceased, when the deceased himself was fully aware of the oil spill. The responsibility for the maintenance of that pump rested with the deceased himself. It defies logic to say that under the circumstances of this case the shipowner was under a duty to provide the deceased with a safe place to work, when the very reason

for the presence of the deceased aboard the vessel was that his pump had failed and in failing had created the oil spill which caused his death.

6. The decision of the United States Court of Appeals for the Third Circuit in the instant case has raised questions of importance as to the extent to which a United States Court, sitting on a case where recovery can be had only under state statute, may ignore the specific rulings of the courts of that state on the issues, and as to the extent to which that court may incorporate into the state's wrongful death act concepts which are alien to the state act and state authorities.

This decision of the United States Court of Appeals of the Third Circuit has aready led one of our Courts of Appeals to go even further astray in "borrowing" general maritime law concepts in passing upon an action under the Wrongful Death Act of New Jersey. The United States Court of Appeals for the Second Circuit in *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association, supra,* has held in a similar case tried in the District Court under the New Jersey Wrongful Death Act, that the contributory negligence of the deceased resulted only in a mitigation of the damages, in accordance with the substantive provisions of the general maritime law, whereas the New Jersey Courts have held that contributory negligence of the deceased under that Wrongful Death Act constitutes a total bar.[2] We have here flagrant examples of United States Court deciding cases

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[2] As noted in this petition, it is the intention of counsel for the defendants in the *Halecki* case to file a petition for a Writ of Certiorari in this Court, which petition we understand is due in the second week in April, 1958. Since the points at issue are so similar, and since the same counsel represents the libelant-respondent and the plaintiff-respondent in the *Skovgaard* and *Halecki* cases, respectively, we suggest that it might be appropriate to defer a ruling on the instant petition pending receipt of the petition and the opposing brief in the *Halecki* matter.

governed by state law in a way completely at odds with the way they would have been decided in the state courts.

Such a trend frustrates the continued efforts of this Court to bring about uniformity of result in our state and federal courts. If the right is established by the federal maritime law, then the results should be the same whether tried in the state court or the federal court. To the same extent, where the sole right is under state law, the end result and the standards applied should be the same irrespective of the forum, and the federal courts must be prepared to follow relevant state decisions.

This decision of the majority of the United States Court of Appeals for the Third Circuit, which is the subject of this petition, constitutes a dangerous departure from the principles which have guided our Courts in the handling of cases in our federal courts, where the right derives solely from a state statute, and in which, heretofore, our federal courts have been admonished to apply the substantive law just as though the action had been brought in one of the courts of that state.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated, New York, N. Y., March 21, 1958.

Respectfully submitted,

JAMES M. ESTABROOK,
Counsel for Petitioners,
80 Broad Street,
New York 4, N. Y.

DAVID P. H. WATSON,
of Counsel.

Appendix A

(Opinion of Modarelli, D. J.)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 12-55

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of CARL E. SKOVGAARD, deceased,

Libelant,

—v.—

The vessel m/v TUNGUS, her boilers, etc., and DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMPSKIBSAKTIESELSKAB, et al.,

Respondents,

and

EL DORADO OIL WORKS,

Respondent-Impleaded.

Appearances:

BAKER, GARBER & CHAZEN, Esqs., Proctors for Libelant; By: NATHAN BAKER, Esq.

MCALEER, CONNELL & CORRIDAN, Esqs., Proctors for Respondents.

HAIGHT, GARDNER, POOR & HAVENS, Esqs. (N. Y. Bar); By: J. WARD O'NEILL, Esq. and DAVID P. H. WATSON, Esq., Of Counsel.

WILBUR A. STEVENS, Esq., Proctor for Respondent-Impleaded.

KIRLIN, CAMPBELL & KEATING, Esqs. (N. Y. Bar); By: JOSEPH M. CUNNINGHAM, Esq., Of Counsel.

MODARELLI, *District Judge*:

In October, 1952, at a foreign port, coconut oil was loaded into the two deep tanks of No. 3 shelter deck of the

respondent cargo vessel m/v Tungus. On December 5, 1952, at 5:30 p.m., she docked at a Bayonne, New Jersey, pier. The owner of the oil in the port deep tank having arranged with respondent-impleaded, El Dorado Oil Works to discharge and store the oil, cargo surveyors and El Dorado workers went aboard to prepare for the discharge of the oil from the port tank.

Under the supervision of the El Dorado workers, two of the ship's crew operated winches; they were aided by one officer of the ship; the port deep tank lid was lifted, rotated 90°, and lowered to a position across the top of its coamings so that the after third of the tank was open. The El Dorado workers were satisfied with the position of the tank lid. A pump, owned by El Dorado, was lifted by the ship's winches and lowered into No. 3 shelter deck and placed on top of the port deep tank lid under directions of an El Dorado worker; he also directed the rigging of the suction and discharge hoses. Two hatch beams were lying side by side between the port and starboard deep tank coamings; the beams were used when dry cargo was carried in the tanks. The location of the beams was the normal storage place during the hauling of liquid cargo. The testimony of Wagner, who was employed by El Dorado as a maintenance machinist describes the condition of the pump prior to its use:

> "A. I received—that morning I received orders from my supervisor, Mr. Skovgaard, [his death is the basis of this action] to repair the pump, check it, because the ship is coming in later that day. I went down to where it was, in the mill building below the machine shop, and I went through my routine inspection, re-aligned the gears, and I told Carl [Skovgaard] what else I can do.
>
> He told me it would be a good idea to go ahead. I put four pins in the legs of the pump to secure it to

the base so she don't shift on us. I also put new packing in, in the glands and new fins inside the pump.

Q. New what? A. Fins, blades that bring up the oil.

Q. After you were finished with this inspection and repair of the pump, what did you do? A. I called it to the attention of Mr. Skovgaard. We both went over it. We turned it by hand to make sure it is workable, and everything, and we were both satisfied that she was in good working condition.

* * *

Q. But when you and Carl Skovgaard were finished inspecting the pump, and you were both convinced that it was working properly? A. Yes, sir.

Q. —what did you do with it then, did you put it on the pier to await the arrival of the ship? A. Yes. They took it on what they call a stringpiece, or something, on the side of the pier and put it there." (Transcript, pp. 542-543.)

At 8:05 p.m., December 5, 1952, El Dorado's workers began to discharge the oil from the tank of the m/v Tungus. Attached to the pump was an air injection nipple, which was not an integral part of the pump but was made by El Dorado workers out of parts in stock and then attached to the pump. The ship's log book entry for December 6 describes the next event, which occurred at 12:15 a.m.:

"At 0015 the oil connection burst where the steam pipeline is screwed on to same, becoming leaky. The leakage was detected by the ship's 3rd Officer who was on watch. The 3rd Officer tried immediately to call men from the pump crew, but it was found that none of the pump crew was on board. Before the 3rd Officer had succeeded in getting hold of the men

which were down on the dock the connection was broken off and the coconut oil gushed out into the starboard side of the shelter deck and down through the hatch covers in the forward part of the tank into the No. 3 lower hold. The pump was stopped immediately as the men came on board. The oil, however, continued to pass through the leaky place as the oil was running back through the oil hose. However, one succeeded in stopping the leakage by inserting a plug, but not before several tons of oil had run into the deck and lower hold.

The oil stained about 50 paper bags desiccated coconut bound for Boston stowed in the starboard side of the shelter deck.

The oil ran underneath mahogany lumber which was stowed in the after part of the shelter deck in No. 3. It continued through the shelter deck into No. 4 under bales of rugs which were stowed there. In the lower hold No. 3 are stowed steel plates, scrap brass metal and mahogany lumber."

As a result of the oil spill, liquid coconut oil covered the entire area surrounding the pumping operation, including the top of both tank lids, the area forward of the tank coamings and between the port and starboard tank coamings. After the pump had been stopped the chief officer of the ship and the cargo surveyors went into the shelter deck to ascertain the extent of the cargo damage. Donohue and Russo, El Dorado employees, then replaced the broken fitting on the pump after "squeegeeing" * the spilled oil from a working area sufficient to repair the pump. The deceased Skovgaard, a maintenance foreman employed by El Dorado, was called from his home to assist in repairing

* Done by the use of a squeezeable mop.

the pump and restoring it to operation. At 1:25 a.m., he boarded the vessel. Since Donohue and Russo still were working on the disabled pump, he went down into No. 3 shelter deck to assist them. In moving from the foot of the ladder leading down from the main deck to the shelter deck, Skovgaard walked through the area over which the oil had spilled. As he walked aft of the port tank, he stepped on either one or both of the hatch beams; then as he attempted to step onto the top of the tank he slipped on the spilled oil and fell to his death into 8 feet of hot oil contained in the hatch opening of the port tank.

Libelant argues that she has two separate causes of action: One, under the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1 et seq., for negligence and the other under the general maritime law of unseaworthiness. The question already has been decided. In *Levinson* v. *Deupree*, 345 U. S. 648, 650 (1953), the Court held that "The maritime law does not allow recovery for wrongful death. *The Harrisburg*, 119 U. S. 199; *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 555. In 1920, Congress adopted a Lord Campbell's Act restricted to deaths on the high seas, 41 Stat. 537 et seq., 46 U. S. C. § 761 et seq. * * *." In *Just* v. *Chambers*, 312 U. S. 383, 388, 389 (1941), " * * * this Court, upon an elaborate review of the decisions, concluded that no suit for wrongful death would lie 'in the courts of the United States under the general maritime law.' *The Harrisburg*, 119 U. S. 199, 213. See, also, *The Consair*, 145 U. S. 335, 344. The absence of a federal or state statute giving a right of action was emphasized. But when a State, acting within its province, has created liability for wrongful death, the admiralty will enforce it." Further, at page 391, the Court said: " * * * The pith of the matter is that the maritime law, as we conceived it, did not permit recovery, [in the case of wrongful death] and in the same sense * * *." The Court of Appeals for this

Circuit also has spoken; in *Klingsciesen* v. *Costanzo Transp. Co.*, 101 F. 2d 902 (C. A. 3 1939): "* * * In the case at bar, we may not apply the familiar rule of admiralty where contributory negligence serves to divide the damages. It is settled that no suit may be brought to recover damages for death in an admiralty court of the United States under general maritime law. Such a right exists solely by statute. The appellant has based her suit upon a statute of Pennsylvania. * * *"

Thus it is clear that libellant's recovery, if any, is under the New Jersey Death Act, N. J. S. A. 2A:31-1.

Incidentally, the respondent and respondent-impleaded both refer to a proceeding instituted by the libelant in the New Jersey Department of Labor and Industry, Division of Workmen's Compensation, Hudson County District, in which the then respondent, El Dorado Oil Works, questioned the jurisdiction of the New Jersey Compensation Bureau, alleging that jurisdiction was under the Longshoremen's and Harbor Workers' Compensation Act. 33 U. S. C. § 903 et seq. In his decision, Deputy Director Lorenz held that the New Jersey Department of Labor and Industry, Division of Workmen's Compensation, had jurisdiction over the petition seeking compensation for the death of Carl E. Skovgaard, holding "that, being in the twilight zone, the decedent, *not being connected in any way with the operation of the ship,* I find comes under the protection of this Division." (Emphasis supplied.) A compensation award was accordingly made for the payment to the widow, libelant herein, until May 12, 1969, at which time the youngest child of the decedent will reach the age of 18.

The libelant alleges that respondent's negligence consisted of: (1) Allowing the port tank to remain partly open without placing ropes or other barriers around it, (2) inadequate lighting in the shelter deck, (3) placing iron beams in the walking space between the two tanks, (4) leav-

ing oil on the deck, tank lid, beams, and in the walkway between the tanks near an open, unguarded tank.

As to (1), there was no negligence in allowing the tank to remain open as part of the cargo unloading operation. The tank opening was necessary to discharge the oil. See *Long* v. *Silver Line, Ltd.*, 48 F. 2d 15 (C. C. A. 2 1931); *The Kongosan Maru*, 292 F. 801, 803, 804 (C. C. A. 9 1923); *The Louisiana*, 74 F. 748, 750, 751 (C. C. A. 5 1896).

As to (2), on the night of Skovgaard's death there were four permanent deck lights forward and aft of the hatch, and two reflectors with 500 ampere bulbs immediately after the hatch; there were also four regular cargo lights shining directly into No. 3 shelter deck. Additionally, the lighting in the hatch was adequate for two surveyors to make their calculations and for Donohue and Russo to replace the sheared-off air injection nipple.

As to (3), libelant cites only *Cooney* v. *United States*, 74 F. Supp. 26 (W. D. Wash. 1946). In that case, hatch boards had been piled or loosely thrown on deck, causing the ship's deck engineer to fall when he stepped on the pile while he was walking along the deck. The court concluded that there had been a negligent piling of the boards. The case does not hold that the mere presence of boards is negligence but only that an improper piling of boards is a negligent condition. Here, there is no proof that the iron beams were unfit to walk upon, aside from the fact that they were covered with oil, which will be discussed. Moreover, the facts are inconsistent with the theory that the presence of the beams caused Skovgaard to fall into the tank. His fall was caused by slipping when he had at least one foot already on the lid.

As to (4), the issue correctly is stated by respondent: Whether during the repair operations it was the vessel's duty to the deceased to clean up the oil spill. Respondent forcefully contends that "Not a single authority has been cited by proctor for libellant which spells out a duty on

the part of the vessel to clean up an oil spill caused by the very parties whose sole duty and function it was to discharge the oil properly, and whose employee it is who is now attempting to recover." The court agrees. In support of her proposition that it was the vessel's duty to clean up the oil spill, libelant cites *Anderson* v. *Lorentzen*, 160 F. 2d 173 (C. A. 2 1947); *Fodera* v. *Booth American Shipping Corporation*, 159 F. 2d 795 (C. A. 2 1947); *Santamaria* v. *Lamport & Holt Line, Ltd.*, 119 N. J. L. 467 (E. & A. 1938); *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314 (1952). None of those cases aid libelant. The negligence of the vessel in the *Anderson* case was in its failure to warn a longshoreman of the dangerous nature of the cargo. Here, however, the dangerous oil spill was known to Skovgaard. In *Fodera*, the negligence clearly was that of the shipowner and not, as here, that of the injured party's fellow employees. *Santamaria* does not hold that a shipowner is liable to a worker for a condition created by his fellow employees. Moreover, under New Jersey law when the employee of an independent contractor enters property at the instance of the owner to correct the precise condition which later causes the employee's injuries, the owner is not liable unless he supervised or controlled the employee. *Broecker* v. *Armstrong Cork Co.*, 128 N. J. L. 3 (E. & A. 1942). Here, Skovgaard boarded the vessel to help repair the defect and restore to operation the pump which caused the oil spill. The entire repair operation was conducted by El Dorado, and there is no evidence from which to infer that any m/v Tungus personnel supervised or controlled either the discharge of the oil from the tank or the repair of the pump. In McFall, the court held that a longshoreman who is employed by an independent contractor engaged by the owner to load its ship, is an invitee aboard the vessel. "As such he is entitled to a reasonably safe place to work. The duty of exercising reasonable diligence to provide such a place and warn the longshore-

men of hidden dangers devolves upon the owner of the ship * * *." Page 324. Here, however, the independent contractor El Dorado was engaged by the owner of the cargo who was not the owner of the ship.

I am not persuaded that the owner of the vessel is under any duty to protect the workmen of the independent contractor, El Dorado Oil Works, engaged by the owners of the cargo of coconut oil, against the dangerous conditions created by the very work for which the independent contractor was hired. Accordingly, the court finds that the respondents are not liable for Skovgaard's unfortunate death and the libel must be dismissed.

The foregoing opinion shall constitute findings of fact and conclusions of law, as required by Rule 52.

An order may be submitted in conformity with the opinion herein expressed.

Appendix B

(Opinion of Staley, C. J. and Dissenting Opinion of Hastie, C. J.)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,025

No. 12,031

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of CARL E. SKOVGAARD, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of CARL E. SKOVGAARD, deceased,

Libellant-Appellant,

against

The Vessel M/V TUNGUS, her boilers, etc., and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, et al.,

Respondents-Appellants,

and against

EL DORADO OIL WORKS,

Respondent-Impleaded-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Reargued October 22, 1957

Before BIGGS, *Chief Judge*, and MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges*.

OPINION OF THE COURT

(Filed December 23, 1957)

By STALEY, *Circuit Judge*.

This admiralty appeal urges upon us the contention that the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-

1, is broad enough to encompass an action for death based upon a breach of the warranty of seaworthiness.

Carl E. Skovgaard met his death by suffocation and shock when he slipped and fell into a tank of heated coconut oil aboard the M/V *Tungus*. On December 5, 1952, the *Tungus*, with a cargo of coconut oil, was docked at a pier in navigable waters at Bayonne, New Jersey. The respondent-impleaded El Dorado Oil Works agreed with the owners of the oil cargo in the port deep tank to discharge the oil from the vessel and to store it. Employees of El Dorado began to discharge the oil from the tank around 8:00 p. m. of December 5, 1952. Two officers and two crew members of the *Tungus* remained aboard on duty; the latter two were specifically assigned to assist El Dorado in the discharge operations. The pump owned by El Dorado and used in the operation was apparently in good working order until around 12:15 a. m., December 6. It was then that an air injection nipple burst, causing tons of hot coconut oil to be pumped directly onto the shelter deck of the *Tungus*. It was the crew of the vessel that first discovered the leak and took temporary steps to stop it.

The deceased Skovgaard was a maintenance foreman of El Dorado. He was called from his home shortly after the leak developed to assist in repairing the pump. He arrived on board around 1:25 a. m. As Skovgaard walked aft of the port tank, he stepped on the hatch beams and then attempted to step onto the top of the tank. He slipped on the spill and fell to his death in the hot oil.

The suit was brought by Olga Skovgaard, administratrix of the estate of the deceased. Her libel pleads principally two causes of action, one predicated on unseaworthiness, the other on negligence. Both of these causes of action were based upon the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1. After trial was held, the district court dismissed the libel, deciding that an action for death by unseaworthiness did not lie *in the general maritime law*, and as to the negligence question, that the vessel owed no duty to the deceased to clean up the oil spill. 141 F. Supp.

653 (D. C. N. J. 1956). The impleading petition against El Dorado was dismissed; respondent took a precautionary appeal from this action.

It is an established principle of maritime law that in the absence of statute there is no remedy for wrongful death. The Harrisburg, 119 U. S. 199 (1886); Levinson v. Deupree, 345 U. S. 648, 650 (1953). "Death is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land."—Justice Cardozo in Cortes v. Baltimore Insular Line, Inc., 287 U. S. 367, 371 (1932). In an effort to obviate a plain inequity, Congress in 1920 enacted the Death on the High Seas Act, 46 U. S. C. § 761 et seq., which provided a remedy in admiralty for death occurring more than a marine league from shore. This statute, of course, does not apply to death occurring on territorial waters. Nonetheless, when death occurs on navigable waters within a state whose statutes have created a cause of action for death by wrongful act, admiralty courts will entertain such an action by permitting the state statute to supplement the general maritime law. Western Fuel Co. v. Garcia, 257 U. S. 233 (1921); Just v. Chambers, 312 U. S. 383, 388 (1941).

It follows that whatever right appellant has in seeking redress for the death of Skovgaard must be based upon the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1, which reads as follows:

> "When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime."

Appellant urges that unseaworthiness is a "wrongful act, neglect or default" within the meaning of the New Jersey Act.

We are of the opinion that the district court misconceived the nature of the first cause of action as a death action under general maritime law. It was in fact brought specifically under the New Jersey death act.

In the determination of whether unseaworthiness is such a "wrongful act, neglect or default" as will admit of recovery, we must look to the construction given to the Act by the New Jersey courts. They have held that the Act is in the highest sense remedial, and is entitled to a liberal construction, for its aim was to abolish a harsh and technical rule of the common law. Haggerty v. Central Railroad Co., 31 N. J. L. 349 (1865); Cibulla v. Pennsylvania-Reading Seashore Lines, 25 N. J. Misc. 98, 50 A. 2d 461 (1946).

The nature of the conduct which will create liability under the New Jersey statute is of crucial importance. The legislature describes it as "wrongful act, neglect or default." It is presumed that the legislature did not employ useless verbiage and that each word has independent meaning. Ford Motor Co. v. New Jersey Department of Labor and Industry, 5 N. J. 494, 76 A. 2d 256, 260 (1950); 82 C. J. S. Statutes § 316 at pages 551-552 (1953). The conduct required to impose liability, therefore, is not limited to that conduct embraced in the historical concept of negligence. The words encompass something more. See, e.g., The H. S., Inc., No. 72, 130 F. 2d 341 (C. A. 3, 1942); Judson v. Peoples Bank and Trust Co. of Westfield, 17 N. J. 67, 110 A. 2d 24, 35-36 (1954).

It is urged that since unseaworthiness is spoken of as a species of liability without fault, it cannot be a "wrongful act, neglect or default" within the meaning of the statute. However, the characterization of unseaworthiness as liability without fault is dangerously deceptive. For urgent and sound reasons of public policy, the law has imposed the

absolute duty upon the shipowner to provide a seaworthy vessel, and liability results only as a consequence of the breach of that duty. If "fault" means negligence alone, of course no fault is required, and to that extent only, the phrase "liability without fault" is accurate. But to say that one who breaches a duty is without fault is a logical as well as a legal incongruity.

The seaman possesses the legal right of a seaworthy ship. Whenever this legal right is infringed and harm results by reason of the ship being unseaworthy, a "wrong" occurs, whether it be of omission or commission. The Supreme Court of New Jersey has defined "wrongful act" as "any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right." Louis Schlesinger Co. v. Rice, 4 N. J. 169, 72 A. D. 197, 203 (1950). Culpability is not necessary to constitute a wrong. It is the liability-creating quality of an act which makes it wrongful.

If it be said that the New Jersey act provides redress for tortious conduct alone, we answer that providing an unseaworthy ship is a tort. As was said in Strika v. Netherlands Ministry of Traffic, 185 F. 2d 555, 558 (C. A. 2, 1950):

> "It would follow from that analysis that the breach of the 'obligation' to furnish a seaworthy ship is a tort; and that is a result consonant with the historical attitude towards breaches of warranty, which until 1778 had to be sued in tort, and which may still be so treated if the distinction is important."

The New York Court of Appeals has decided in a food poisoning case that the breach of the warranty of fitness for human consumption, imposed by law upon considerations similar to the imposition of the warranty of unseaworthiness, is a "wrongful act, neglect or default" within the

New York wrongful death statute. Greco v. S. S. Kresge Co., 277 N. Y. 26, 12 N. E. 2d 557 (1938).

The New Jersey statute further refers to the "wrongful act, neglect or default" as one "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury." This language may admit of alternative interpretation. It may be construed as defining the nature of the "wrongful act, neglect or default"—i.e., if the conduct would have been actionable by the decedent had he lived, by virtue of that very fact his named beneficiaries would have an action in the event of his death. Or the clause may be construed as a limitation or an additional requirement—i.e., the conduct upon which the suit is based must be such that decedent could have sued had he lived, in addition to being a "wrongful act, neglect or default." In either interpretation, the statutory requirements are met by plaintiff here, for if Skovgaard had merely been injured he could have maintained an action against the vessel on the theory of unseaworthiness, since he was one "within the range of its humanitarian policy." Seas Shipping Co. v. Sieracki, 328 U. S. 85, 95 (1946).

We hold that the failure to provide a seaworthy vessel in the case before us is such "wrongful act, neglect or default" as will allow recovery under the New Jersey wrongful death statute.[1]

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[1] It is interesting to note that this court has several times held in the determination of the question of laches in an action for personal injuries based upon unseaworthiness that the analogous statute of limitations to be applied is the Pennsylvania two-year statute which uses language substantially similar to the New Jersey Wrongful Death Act. The time limitation is imposed in actions for injury "wrongfully done to the person." Act of June 24, 1895, P. L. 336, § 2, 12 Purdon's Pa. Stat. Ann. § 34. See Kane v. Union of Soviet Specialist Republics, 189 F. 2d 303 (C. A. 3, 1951), cert. denied, 342 U. S. 903 (1952), and Taylor v. Crain, 195 F. 2d 163 (C. A. 3, 1952).

Appendix B

The same conclusion was reached by Judge Learned Hand in his dissenting opinion [2] in Gill v. United States, 184 F. 2d 49, 57 (C. A. 2, 1950):

> "* * * Is a vessel owner liable for a seaman's—or a longshoreman's—death within the territorial waters of a state when it is caused by the unseaworthiness of the vessel? *I have no doubt that the death was owing to the respondent's 'wrongful act, neglect or default,' as the New Jersey Act uses those words* * * *." [Emphasis supplied.]

The right thus created by the New Jersey statute may be enforced in a court of admiralty, for it is certainly "not hostile to the characteristic features of the maritime law or inconsistent with federal legislation." Just v. Chambers, 312 U. S. at page 388.

In Lee v. Pure Oil Co., 218 F. 2d 711 (C. A. 6, 1955), it was held that an action for unseaworthiness would not lie pursuant to the Tennessee wrongful death act. It must be noted, however, that the Sixth Circuit commented that the Tennessee Act allowed recovery only for negligence.

To the extent that Graham v. A. Lusi, Limited, 206 F. 2d 223 (C. A. 5, 1953), and Mortenson v. Pacific Far East Lines, Inc., 148 F. Supp. 71 (N. D. Cal. 1956) express views on similar statutes of other states contrary to those expressed in this opinion, we are in disagreement with them.

As to the negligence question, the holding of the district court that no duty devolved upon the vessel *Tungus* to clean up the oil spilled was predicated upon a finding of fact that the operation of repairing the pump was conducted by El Dorado, and that no evidence indicated that *Tungus* personnel either supervised or controlled the discharge of the oil.

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[2] The disposition by the majority rendered a decision on this issue unnecessary.

Appendix B

While it may be true that El Dorado supervised the pump repair operation, this would hardly lessen the duty of the vessel to provide a reasonably safe place to work, especially since El Dorado's supervision was not so complete as to exclude crew members from the area. In fact, it was the crew which first discovered the oil leakage and adopted temporary measures to stop it. The chief officer of the *Tungus* testified that it was the custom to offer the assistance of ship personnel to independent contractors unloading the vessel. The personnel of the *Tungus* were well aware of the existence of the oil spill and the danger created by it.

The assimilation by Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946) of longshoremen to the position of seamen so far as unseaworthiness is concerned did not take away from the longshoreman his accustomed right to recovery on the theory of negligence. Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 413-414 (1953). Engaged in the work of unloading the ship, Skovgaard was a business invitee. See concurring opinion of Justice Frankfurter in Pope & Talbot, Inc. v. Hawn, supra at page 416; see also Santamaria v. Longport & Holt Line, 119 N. J. L. 467, 196 Atl. 706 (Err. & App. 1938). It is relevant to note at this point that Skovgaard was called for the purpose of repairing the pump, not to clean up the oil spill. It is alleged that his death was caused by the condition of the deck and tank and not by the instrumentality he intended to repair. Cf. Broecker v. Armstrong Cork Co., 128 N. J. L. 3, 24 A. 2d 194 (Err. & App. 1942).

The duty of providing Skovgaard with a reasonably safe place to work, Hawn v. Pope & Talbot, Inc., 198 F. 2d 800, 803 (C. A. 3, 1952), affirmed, 346 U. S. 406 (1953), would not be lessened even if there were a concurrent duty on the part of Skovgaard's employer. Feinman v. A. H. Bull Steamship Co., 216 F. 2d 393 (C. A. 3, 1954).

While the New Jersey wrongful death statute adopts the maritime standard of care, it is silent as to available

defenses. It is not for us in the first instance, however, but rather for the trier of fact, to determine whether the vessel's duty was breached and to decide factually what defenses, if any, might be available to the respondent. The question of the unseaworthiness of the vessel is likewise one which should be determined initially by the district court.

The judgment of the district court dismissing the libel will be reversed, and the cause will be remanded for further proceedings in conformity with this opinion. The judgment of the district court also dismissed the inpleading petition as a consequence of the dismissal of the libel. This will also be reversed inasmuch as the liability of the impleaded defendant cannot be determined until there has been a full and adequate development of the facts.

HASTIE, *Circuit Judge*, with whom MARIS and KALODNER, *Circuit Judges* join, dissenting.

In one aspect the present libel pictures the shipboard death of libellant's decedent within the state of New Jersey as having resulted, without negligence on the part of the respondent shipowner, from an unseaworthy condition of the vessel. This court now holds that New Jersey, in its Wrongful Death Act, has made a non negligent shipowner liable for death thus caused within the borders of that state. We think this is a mistaken interpretation of the New Jersey law and, therefore, dissent.

The division of the court on this point seems best explained by starting with certain premises and underlying concepts upon which all of us agree. A federal court is here asked to enforce a cause of action, the existence and dimensions of which are determined solely by the law and policy of New Jersey. True, the United States District Court which heard this case was sitting "in admiralty". But for

present purposes this is significant only in that the practice properly followed in that forum is admiralty practice. Thus, the proper form of complaint in this case was a libel in the admiralty style. The shipowners could be reached by attaching the vessel in the classic admiralty manner. But beyond such matters of legal administration, the substantive concepts of admiralty had no effect as law in defining the claim. State law and it alone performed that function. Admiralty was merely the administering forum in a situation in which the maritime law itself did not even provide a cause of action for wrongful death.

The Supreme Court has recently made an explicit and authoritative statement of what a district court does in a situation like this:

> "The United States District Court for the Eastern District of Kentucky heard this suit sitting in admiralty. . . . The District Court adopted and enforced the *obligatio* created by the State of Kentucky not because it sits in Kentucky and responds to the desirability of uniformity in the administration of justice within that State. In the absence of congressional action, the court adopted and enforced the *obligatio* created by Kentucky as it would one originating in any foreign jurisdiction. . . . And it was bound to enforce it as it found it, . . . [except for] procedural niceties. . . ."[1]

For present purposes the most important part of this exposition is the concluding sentence: "it [the federal admiralty court] was bound to enforce it [the state *obligatio*] as it found it. . . ."

Thus, to the extent that state policy has led the state legislature to give dependents rights against one who has caused the death of their provider within the state, a

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[1] *Levinson* v. *Deupree*, 1952, 345 U. S. 648, 651-2. And see the similar rationalization of Circuit Judge, now Chief Judge, Biggs in Klingseisen v. Constanzo Transp. Co., 3d Cir. 1939, 101 F. 2d 902, 903.

federal court will carry out that policy. Ordinarily the federal court entertains the state created wrongful death claim on its law side. But where the fatal injury has occurred on navigable water, it is accepted practice to entertain the suit on the admiralty side. But, in either event, it is the state law, as defined and construed in the light of state policy, which the federal court must apply.

It is believed that all members of this court accept the above outlined legal theory of what a federal court does and how it should approach its task in a case like this. However, we who dissent think the majority has disposed of this case as if admiralty policies and concepts developed by federal courts in maritime causes were controlling when there is nothing to show that New Jersey has adopted or would adopt these federal maritime concepts of liability to define rights it has created as part of its common law jurisprudence.

The New Jersey Wrongful Death Act, like most prototypes of Lord Campbell's Act, gives dependents a right to recover for death caused by the "wrongful act, neglect or default" of another. Historically, neither the common law nor any statute of New Jersey seems ever to have utilized the circumstances of unseaworthiness as a basis of imposed liability for non-negligent personal injury. To reach this court's result it is necessary to attribute to New Jersey a purpose to make a novel piecemeal borrowing of maritime concepts.

We call this borrowing novel and piecemeal advisedly. It has long been a peculiar and characteristic feature of admiralty law that a ship is responsible to indemnify members of its company for injuries caused by the unseaworthiness of the vessel.[2] But historically this responsibility covered only the members of the crew.[3] Moreover, a crewman's rights did not survive him. It is only in recent years,

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[2] *The Osceola*, 1903, 189 U. S. 158.

[3] See Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 1954, 39 Corn. L. Q. 381, 408.

long since the enactment of the New Jersey Wrongful Death Act, that admiralty case law of the United States courts has extended the seaman's protection against unseaworthiness to longshoremen and other persons not members of the crew.[4] Thus, to construe the New Jersey statute as applicable to the present case, requires not only the inference that the New Jersey statute was intended to create rights in accordance with admiralty concepts of liability as they existed when the legislation was passed, but also that subsequent modifications of admiralty concepts by the federal courts routinely become a part of New Jersey policy and law.

Moreover, although the majority do not face the problem here, the question must arise whether under the prevailing analysis New Jersey accepts the unseaworthiness concept alone in defining the statutory rights it has created, or whether other admiralty doctrines, notably that of comparative negligence, are also part of the state created right. This court and others have from time to time rejected the idea that state wrongful death causes incorporate the admiralty comparative negligence concept.[5] If the fact that comparative negligence is a liability defining concept peculiar to maritime law prevents its implied incorporation in a state created death cause, the same seems equally true of the maritime unseaworthiness concept.

Thus, even if the New Jersey cases provided no guide for the interpretation of the Wrongful Death Act in situations of this kind the conclusion reached by the majority would seem illogical and for that reason unwarranted. We

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[4] *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85 (longshoreman); *Pope & Talbot, Inc.* v. *Hawn*, 1953, 346 U. S. 406 (carpenter working on a ship).

[5] *Curtis* v. *A. Garcia Y Cia., Ltda.*, 3d Cir., 1957, 241 F. 2d 30; *Klingseisen* v. *Costanzo Transp. Co.*, 3d Cir., 1939, 101 F. 2d 902; *Byrd* v. *Napoleon Ave. Ferry Co.*, D. C. E. D. La., 1954, 125 F. Supp. 573, *aff'd per curiam*, 5th Cir., 1955, 227 F. 2d 958, *cert. denied*, 351 U. S. 925; *Feige* v. *Hurley*, 6th Cir., 1937, 89 F. 2d 575.

are the more confident of this view since several federal and state courts interpreting death statutes of other states have been unable to find therein any satisfactory rationale for the use of the unseaworthiness concept in defining the causes of action which these state statutes have created.[6]

But we think the New Jersey cases are instructive and helpful. They show rather clearly the way in which the New Jersey courts understand their wrongful Death Act. As a general proposition, common-law concepts of tort, with negligence a prerequisite to recovery, are read into the New Jersey statute by the courts of that state. If a fatal accident occurs on land or non-navigable water within New Jersey, or if anyone other than the shipowner is sued for a fatal accident on a ship in navigable New Jersey water, there is no question that New Jersey policy and law require a showing of lack of due care to establish a claim under the Wrongful Death Act.[7] It would be strange for New Jersey to rule that under the general wording of the statute, there is a different and more stringent duty on shipowners in navigable water. At least two cases indicate the absence of any such special onerous responsibility on shipowners.

In *Santamaria* v. *Lamport & Holt Line, Ltd.*, E. & A. 1938, 119 N. J. L. 467, 196 Atl. 706, an action under the New Jersey Wrongful Death Act, a shipowner was sued for the death of a stevedore who, while unloading a vessel, was thrown into the hold by the upending of a board constituting part of a hatch cover. In *Moran* v. *Moore-McCormack Lines*, 1944, 131 N. J. L. 332, 35 A. 2d 415, a personal injury case, one line of proof indicated that a stevedore's injury

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[6] *Lee* v. *Pure Oil Co.*, 6th Cir., 1955, 218 F. 2d 711; *Graham* v. *A. Lusi, Ltd.*, 5th Cir., 1953, 206 F. 2d 223; *Mortenson* v. *Pacific Far East Lines, Inc.*, D. C. N. D. Cal., 1956, 148 F. Supp. 71; *Babin* v. *Lykes Bros. S. S. Co.*, 94 So. 2d 715 (La. 1957).

[7] *E.g.*, *Stewart* v. *Norton*, 1951, 6 N. J. 591, 80 A. 2d 111; *DeCicco* v. *Marlou Holding Co.*, E. & A. 1948, 137 N. J. L. 186, 59 A. 2d 227.

had been caused by a latent defect in a skid which the shipowner had provided for the unloading and transferring of cargo. In both cases the New Jersey courts emphasized the absence of liability unless negligence on the part of the shipowner should be proved. True, there was no discussion of the unseaworthiness of vessel or gear as a possible basis of liability without fault. Still if the substantive law of New Jersey as applicable to wrongful death causes recognizes an absolute duty of a shipowner to supply a longshoreman with a seaworthy vessel and gear, it is very difficult to believe that neither court nor counsel would advert to this legal basis of liability in cases so obviously appropriate for its invocation. It should be added that we have found no mention of this possibility in any other New Jersey case.

We think it clear that in administering their Wrongful Death Act, whether the injury has been on land or water and whether the defendant has been a shipowner or anyone else, the New Jersey courts have consistently defined and confined liability within common law concepts of negligent or intentional wrong. For a federal court to say now that the law of New Jersey is otherwise is to rule in derogation of the whole history of New Jersey litigation interpreting a New Jersey statute as based on common law concepts.

Finding no New Jersey cases helpful, the majority point to decisions of several other state courts holding that death caused by breach of warranty of quality of goods may be actionable under their death statutes.[8] But these cases illustrate the very point we are stressing in dissent. In these states there are statutes or decisions, or both, clearly showing the state policy and legal rule making such adulteration of foods an actionable wrong. It then is logical to view death caused by such violation of state policy and re-

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[8] *Greco* v. *S. S. Kresge Co.*, 1938, 277 N. Y. 26, 12 N. E. 2d 557, and see cases collected in 115 A. L. R. 1020.

quirements as actionable under the local Wrongful Death Act. It is the absence of any such New Jersey concept of unseaworthiness as an actionable wrong which requires an opposite result in this case.

Finally, the majority find support for their view in the fact that the New Jersey statute in terms comprehends fatal injury "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury." This provision is present in almost all death statutes of this type and has been universally considered to be a limiting concept. See PROSSER, TORTS, § 105 (2d ed. 1955). The liability defining part of the statute is found in the words "wrongful act, neglect or default". The limiting words which follow serve only to make sure that defenses which would have been available against the decedent, had he lived, shall be available against the wrongful death claim. We think these limiting words have no bearing upon our present problem whether a maritime type of liability without fault is created by the preceding phrase, "wrongful act, neglect or default".

For the foregoing reasons we think the New Jersey law provides no cause of action for death resulting from unseaworthiness without negligence. Judge Maris and Judge Kalodner would go farther and say that the result of the majority would be incorrect even if New Jersey did incorporate the unseaworthiness concept of admiralty. In this case the district court found as a fact that the decedent knew of the presence of the oil slick which caused him to slip and fall to his death. Indeed, the record shows beyond question that this condition was apparent and obvious. In addition, decedent boarded the ship to repair the very defective valve which had caused the oil to leak and spread over the deck. In these circumstances Judge Maris and Judge Kalodner would hold, relying upon *Bruszewski* v. *Isthmian SS Co.*, 3d Cir., 1947, 163 F. 2d 270, cert. denied 333 U. S. 828, that, even applying concepts of the maritime

law, a shipowner does not warrant, to one so situated and informed as this workman, that the deck is free of oil or of the obvious hazards incidental to the presence of that substance. However, I am content to rest my dissent solely upon the construction and application of the New Jersey law, without examining the reach of the unseaworthiness doctrine, if maritime law were applicable.

This case has a second aspect. The libellant undertook to prove that, quite apart from unseaworthiness, the shipowner was responsible for actionable negligence on the part of the ship's personnel in not providing the decedent with a reasonably safe place to work. On the evidence and the findings we think the defendant was entitled to judgment on this branch of the case.

Here again the majority seem to apply federal admiralty concepts to define a state created death claim. But the question to be decided is the extent of the duty which New Jersey law imposes upon the possessor of a place to provide a safe place to work for employees of independent contractors who entered the place as business invitees. The fact that the place in this case is a ship is incidental and irrelevant for present purposes.

We have already pointed out that in this case it has been established as a fact that the dangerous condition was obvious and actually known to the decedent. In *Newbury* v. *American Stores Co.*, 1935, 115 N. J. L. 604, 607, 180 Atl. 875, 876, the Court of Errors and Appeals stated the rule of New Jersey law which is controlling in such circumstances: "It is axiomatic that the rule that one who enters store premises by invitation may lawfully assume that the proprietor has performed his duty to render the premises reasonably safe, is not applicable where the invitee knows the contrary to be the case." We think *Broeker* v. *Armstrong Cork Co.*, E. & A. 1942, 128 N. J. L. 3, 24 A. 2d 194, turns on the same principle that a danger which is obvious to the business visitor does not constitute a breach of duty

to provide him with a safe place to work. Indeed, this appears to be a principle which is generally accepted in the law of torts.[9]

In these circumstances it is immaterial whether admiralty law, in cases to which it is applicable, may impose a more stringent duty. New Jersey tort principles are controlling here, and under them, on the admitted facts, the person in possession of the place of injury was not responsible for death caused by a condition of which the invitee was fully cognizant.

In our view the judgment below should be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

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[9] TORTS, RESTATEMENT, §§ 340, 343; *Ambrose* v. *Moffat Coal Co.*, 1948, 358 Pa. 465, 58 A. 2d 20. *McCreerey* v. *Westmoreland Farm Bureau Co-Operative Ass'n.*, 1947, 356 Pa. 567, 55 A. 2d 399.

Appendix B

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 12,025 and 12,031

OLGA SKOVGAARD, Administratrix ad prosequendum of the Estate of Carl E. Skovgaard, deceased; and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Appellant in No. 12025,

VS.

The Vessel "M/V TUNGUS", her boilers, engines, tackle, apparel and furniture,

and

DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI,

Appellants in No. 12,031,

and

BARBER STEAMSHIP LINES, INC.,

and

ELDORADO OIL WORKS.

On appeal from the United States District Court for the District of New Jersey

Appendix B

Present:

BIGGS, Chief Judge, and MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY and HASTIE, Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case dismissing the libel and the impleading petition be, and the same is hereby reversed, with costs, and the cause remanded for further proceedings in conformity with the opinion of this Court.

Attest:

IDA O. CRESKOFF,
Clerk.

December 23, 1957

Appendix C

(Opinion of Hand, C. J.)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 94—October Term, 1957

(Argued November 21, 1957 Decided January 10, 1958)

Docket No. 24551

ANNA HALECKI, Administratrix *ad Prosequendum* of the Estate of Walter Joseph Halecki, deceased, and ANNA HALECKI, Administratrix of the Estate of Walter Joseph Halecki, deceased,

Appellee,

v.

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Appellants.

Before:

HAND, HINCKS, and LUMBARD,

Circuit Judges.

Appeal by the defendants from a judgment of the District Court for the Southern District of New York in favor of the plaintiff in an action to recover damages for the death of the decedent in the State of New Jersey because of the negligence of the defendants and of the unseaworthiness of a pilot boat on which he was employed. Affirmed.

LAWRENCE J. MAHONEY for the appellants.

NATHAN BAKER for the appellee.

Appendix C

HAND, *Circuit Judge*:

This appeal is from a judgment for the plaintiff entered on the verdict of a jury, awarding damages for the death of the plaintiff's decedent while engaged in cleaning the pilot boat, "New Jersey," belonging to the defendants. The complaint was based upon two counts; one for negligence and the other for unseaworthiness, and four errors are alleged. First, that the evidence was not sufficient to justify a verdict on either count. Second, that the court erred in submitting to the jury any question of seaworthiness. Third, that the court should have charged the jury under the New Jersey Death Statute contributory negligence was a bar and not a limitation upon damages. Fourth, that the defendants should have been allowed to show that the plaintiff had made inconsistent allegations in another and pending litigation.

On September 22, 1951, the "New Jersey," a pilot boat, was moored at a pier in the repairyard of Rodermond Industries, Inc., North River, Jersey City, for annual overhaul and repairs; the only employee of the defendants on board was a watchman. Part of the work was to clean the ship's generators which had become fouled in use, and Rodermond Industries subcontracted this part of the job to K. & S. Electrical Company, the employer of the decedent, Halecki. On the 28th he and Doidge, a fellow worker, set up the necessary equipment on the boat. Since she was at the time without any electrical current, it was necessary to bring in current from the shore. The generators were cleaned by spraying them with carbon tetrachloride, a volatile liquid, which will "remove all traces of dirt and film," but whose fumes, unless their density is carefully controlled, may be deadly. The generators were in the ship's engine-room, one deck below the main deck, and Doidge and the decedent sought to protect themselves during the work, (1) by using gas masks, and (2) by bringing two "air hoses" and a "blower," actuated by the current from the shore.

One hose was used to spray the tetrachloride upon the generators; the other, to blow in fresh air from the outside. The "blower" was set at the bottom of the engine-room near the generators, and from it led an exhaust pipe to an open door about eight feet above. In addition, the ship's permanent ventilating system was set in action by the outside current; it consisted of some fans and "vents" at the top of the engine-room through which air was drawn in. Thus, means of exhausting the contaminated air consisted of (1) the hose that was not used to spray, (2) the "blower," and (3) the increase of air pressure resulting from the intake of the ship's own ventilating system. Besides this, an open door and an open skylight led to the air. A biochemist, familiar with the use of tetrachloride, after being told in detail the size of the engine-room and the apparatus installed, gave as his opinion that the ventilating system in the engine-room, even when supplemented by the apparatus brought on board and installed by Doidge and the deceased was not "adequate to remove the fumes." The competence of this expert to give an opinion was so much within the discretion of the trial court that only in a clear case should we overrule its decision.[1] The state law of evidence is no longer the final test of the admissibility of evidence.

As we have said the case was left to the jury in a double aspect: (1) whether the defendants had been negligent in furnishing the deceased as a "business guest" with an unfit place to work, and (2) whether the ship was unseaworthy vis-a-vis a shore worker who came aboard to take part in the annual overhaul. It is obvious therefore that the plaintiff's evidence had to support a verdict on both claims; for we cannot know that the unsupported claim was not the one

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[1] *United States* v. *Miller*, 61 F. 2d 949, 950 (C. A. 2); *Tucker* v. *Loew's Theatre & Realty Co.*, 149 F. 2d 677, 679 (C. A. 2); *Trowbridge* v. *Abrasive Co.*, 190 F. 2d 825, 829 (C. A. 3); 2 Wigmore, § 561.

on which alone they brought in their verdict. As to the claim based on negligence, so far as the defendants mean to argue that the engine-room, equipped as it was, was a reasonably safe place in which to work, we hold that the evidence created an issue that could be decided only by a verdict. The deceased was certainly an "invited person," or "business guest," and the shipowner was liable, not only for the negligence of the master,[2] but, although the work was let out to a subcontractor, also for any lack of "reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities."[3] Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the "methods and manner" of its use were proper. So much for the negligence count.

Quite a different question arises as to the warranty of seaworthiness, for, if that attached, it imposed an absolute liability, if the engine-room was not properly equipped. Although in a very scholarly analysis of the earlier decisions, it has been recently argued that the maritime law did not impose such a warranty in favor of seamen,[4] rightly or wrongly the opposite doctrine has become so firmly settled since *The Osceola*, 189 U. S. 158 (1902) that we decline to reconsider the question. All that is left for us on this appeal is whether the warranty of seaworthiness extended to the decedent although concededly he was not a seaman, but as we have said, a "business guest" on a vessel

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[2] *Leathers* v. *Blessing*, 105 U. S. 626, 630

[3] Restatement of Torts, Vol. II, § 344, Comment b.

[4] "Seamen, Seaworthiness and the Rights of Harbor Workers," Francis L. Tetrault, 39 Cornell Law Quarterly, 381.

within the navigable waters of New Jersey. In *Guerrini* v. *United States,* 167 F. 2d 352 (C. A. 2), the ship, as in the case at bar, was moored in Brooklyn alongside a dock, and the libellant, an employee of a subcontractor, was engaged in cleaning her boilers and tanks, when he was hurt by slipping on a grease spot. We held that the doctrine of *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, did not apply. However, that was in 1948 before either *Pope & Talbot* v. *Hawn,* 346 U. S. 406 or *Petterson* v. *Alaska SS. Co.,* 347 U. S. 396, was decided; it is now clear that we were wrong both in limiting the warranty to those doing longshoremen's duties and in supposing that the surrender of "control" of the ship was relevant. We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot* v. *Hawn, supra* (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot* v. *Hawn, supra.*

As might be expected, so shadowy a line of demarcation will in application produce inconsistent results. For example, in *Read* v. *United States,* 201 F. 2d 758, the Third Circuit held that the warranty extended to a "business guest" who was doing part of the work of changing a "Liberty" ship into a transport, while the Ninth Circuit in *Berryhill* v. *Pacific Far East Line,* 238 F. 2d 385, cert. den. 354 U. S. 938, refused relief to a workman who was engaged in "major repairs," as these were described in the District Court (138 Fed. Supp. 859). In the appeal in *Berge* v. *National Bulk Carriers, Inc.* (148 Fed. Supp. 608), decided herewith, we shall state the reasons that impel us to prefer the decision of the Ninth Circuit, but it is not

necessary to pass on that question here, because as we have said, the work did not involve any structural changes in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul. We start therefore with the conclusion that it was proper to leave to the jury, not only the issue of negligence, but that of unseaworthiness.

That does not however answer two other objections: (1) that the plaintiff is not the decedent, but an administratrix, and (2) that the judge left the decedent's contributory negligence to the jury, not as a bar, but only in limitation of damages. It is common ground that the liability for breach of the warranty of unseaworthiness does not survive under the maritime law (*The Harrisburg,* 119 U. S. 199; *Lindgren* v. *United States,* 281 U. S. 38). As to the maritime tort, §33 of the Merchant Marine Act of 1920 (Title 46, § 688) gave to "the personal representatives" of a deceased seaman the same remedies that the deceased would have had, had he lived. However, in the case at bar the deceased was not a seaman, so that upon both counts the plaintiff must resort to the "Lord Campbell's Act" of New Jersey [5] which provides in general terms: "When the death of a person is caused by a wrongful act, neglect or default such as would * * * have entitled the person injured to maintain an action for damages * * * the person who would have been liable * * * shall be liable in an action for damages." Much controversy has arisen over the scope of the phrase just quoted, making the liability to the next of kin depend upon an "act, neglect or default" of the putative obligor. When the question arose in the Third Circuit whether these words covered a breach of the warranty of seaworthiness, the court *in banco* by a vote of four to three held (*Skovgaard* v. *The Tungus,* December 23, 1957) that they did. In spite of the zeal with which the

[5] N. J. S. A. 2A:31-1.

contrary has been argued, we think that the majority was right. *Graham* v. *Lusi*, 206 F. 2d 223 (C. A. 5) does not actually hold the contrary; though that may have been the court's opinion. Its decision was based solely on the point of contributory negligence, and did not pass upon the ruling of the district court that the libel could not rest on breach of warranty. *Lee* v. *Pure Oil Co.*, 218 F. 2d 711 (C. A. 5) held that, even vis-a-vis the deceased, there was no breach of warranty, and then went on to say that in any event his administratrix would not recover. The report does not tell us what was the language of the Tennessee statute; but if it was the same as that of New Jersey, we are not persuaded. We hold that "neglect" and "default" both cover a breach of the warranty.

There remains, however, the further question: *i.e.*, whether contributory negligence is an absolute defense. Before the decision of the Supreme Court in *Pope & Talbot* v. *Hawn, supra*, it had been generally held that when a seaman before the Merchant Marine Act of 1920, or a shoreworker thereafter, had been killed because of the negligence of the ship's crew in the navigable waters of a state having a local Lord Campbell's Act, contributory negligence was a bar to an action by his next of kin. This was as true when the suit was in the admiralty as in a court of the state; in short, the bar arising from contributory negligence was an incident of the liability imposed by the state, no matter where suit upon it was brought.[6] In *Pope & Talbot* v. *Hawn, supra*, however, the Court held that contributory negligence was not a bar to an action at law by

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[6] *Robinson* v. *Detroit V. C. Steam Navigation Co.*, 73 F. 883 (6th Cir. 1896); *Quinette* v. *Bisso*, 136 F. 825 (5th Cir. 1905); *O'Brien* v. *Luckenbach S. S. Co.*, 293 F. 170 (2d Cir. 1923); *Klingseisen* v. *Costanzo Transp Co.*, 101 F. 2d 902 (3d Cir. 1939); *Graham* v. *A. Lusi*, 206 F. 2d 233 (5th Cir. 1953); *The A. W. Thompson*, 39 F. 115 (S. D. N. Y. 1889 per Addison Brown, J.); *The James M'Gee* 300 F. 93 (S. D. N. Y. 1924).

a "business guest," but only limited his damages, and this we read to mean that rights arising from faults that occur in navigable waters are exclusively the creation of maritime law, and are exempt from the defense of contributory negligence whether suit upon it is in the admiralty or in an action at law, state or federal.[7] The following language we take from the opinion of the majority in that case, pages 409, 410: "the right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies a state may not deprive a person of any substantial admiralty rights as defined by acts of congress, or interpretative opinions of this Court." Although, as we have said, we are not dealing with "federal maritime law," we should remember that so far as we can we ought to construe the statute so as to avoid capricious and irrational distinctions. We leave open whether New Jersey is without power to take as much or as little of the rights "rooted in federal maritime law" as it chooses as the model for the right it confers upon the next of kin; but the courts of that state have never passed upon the question, and to deny the exemption to the next of kin seems to us to the last degree capricious and irrational. Although it was only a dictum, the First Circuit in *O'Leary* v. *United States Lines Company*, 215 F. 2d 708, 711, declared that "it would be incongruous to hold in conformity with Pope & Talbot v. Hawn, supra, that the maritime law determined the respective rights of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate consequence of death." We are aware that *Curtis* v. *Garcia*, 241 F. 2d 30, 36 (C. A. 3) is to the contrary, but as neither it nor *O'Leary* v.

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[7] Cf. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239.

United States Lines Company, supra, is authoritative, we are free to choose. Obviously, the answer is not certain; we must do as best we can with what we have, and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar.

Finally, the defendants complain that the judge refused to allow them to prove that the plaintiff in another action had asserted that Rodermond Industries had control of the vessel. Even though this were an error—on which we do not pass—obviously it was not of enough importance to reverse the judgment.

Judgment affirmed.

LUMBARD, *Circuit Judge* (dissenting):

I cannot agree that we must subscribe to the principle that a shore-based worker who performs any labor on a ship, even though the ship is out of operation and tied fast to a dock for overhaul, should have extended to him a warranty of seaworthiness merely because the work which he is doing can be generally characterized in terms of the duties which a seaman could be expected to perform. It is not enough to categorize Halecki's work as cleaning ship's equipment. Here the inescapable fact is that Halecki, in spraying the generators with carbon tetrachloride, was doing something which a seaman could not do, which no seaman had ever done, and which would expose the seaman's life to serious danger if he even attempted it.

A summary of the evidence showing how the generators were cleaned by spraying with carbon tetrachloride shows the absurdity of assimilating this work to that of a seaman or of saying that the work "is of a kind that traditionally the crew has been accustomed to do."

On Saturday, September 22, 1951 the pilot boat "New Jersey," owned by the appellants was turned over to Rod-

ermond Industries, Inc. for its annual overhaul and inspection. It was moored at the Rodermond repair yard pier at the foot of Henderson Street, North River, Jersey City, New Jersey. A list of repairs, prepared by Rodermond the following Monday, September 24 provided that the crew was to remove and replace the eight cylinder heads for the port and starboard generators, and the contractor was to do some work on the cylinder heads. Under the same heading "Port & Star Generators" it was provided:

> "Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order."

Rodermond in turn subcontracted with Halecki's employer, the K & S Electrical Company, to do certain electrical work and to spray the generators with carbon tetrachloride, since neither ship nor shipyard was equipped or competent to do this work. The K & S foreman, Donald Doidge, was at work on the New Jersey from Monday, September 24, and on that day he consulted with the New Jersey's chief engineer as to when the spraying should be done as "we know it has to be done when there is nobody else on board ship." Doidge agreed with the chief engineer that it should be done on Saturday during the absence of the crew, since during the week members of the crew were working on the ship.

Pursuant to these arrangements, Doidge and Halecki made preparations on Friday for the Saturday spraying. Doidge, the shop foreman, had been an electrician for about 25 years and Halecki had worked with him for about 6 years. Not all their work was on ships; they cleaned generators by carbon tetrachloride spray in factories and buildings, wherever the generators were. On Friday they brought on board extra air hoses and a blower belonging to Rodermond. One air hose was used for the spray gun and the other was used underneath the generator as an exhaust to blow the fumes away from the man spraying. A high

compression "blower" was placed so that it would exhaust foul air through one of the two open doorways.

On Saturday morning, September 29, according to the previous arrangement, Doidge and Halecki came aboard to do the spraying. They found only the defendant's watchman, Walter C. Thompson, and they told him to stay out of the engineroom and not to let anybody down. They brought with them three gas masks belonging to K & S Electric Company. Halecki wore a gas mask and did most of the spraying 10 to 15 minutes at a time with intervening rest periods of equal length. All the equipment for exhausting the fumes and the ship's ventilating system were in operation and run by power supplied from generators on shore. Halecki took sick the next day and died two weeks later. There was sufficient evidence to support the jury's finding that death was caused by carbon tetrachloride poisoning.

Despite history and logic, the trend of decisions in cases involving injuries and death on navigable waters, now further extended by my distinguished colleagues, seems to be guided by what Justice Rutledge has frankly called a "humanitarian policy." *Seas Shipping* v. *Sieracki*, 328 U. S. 85, 95 (1946). This policy seems to be based on the theory that judges are competent to determine that it is better that the shipowners should assume all the burdens because they are able to average them out through insurance or some form of protection against all the hazards of accident which may occur on shipboard to anyone coming on board. The result has been a progressive expansion, both qualitative and quantitative, in the duties and liabilities imposed upon shipowners.[1] From a concept resting

[1] See Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381 (1954); The Tangled Seine: A Survey of Maritime Personal Injury Remedies, 57 Yale L. J. 243, 252 (1947); Gilmore and Black, The Law of Admiralty, 315-324, 358 (1957).

on negligence, seaworthiness has, by judicial development, become an absolute duty imposing liability without fault. From a duty running to those we traditionally consider as seamen, exposed to the hazards and discipline of the sea, it has been expanded to include a multitude of harbor workers who report for work in the morning and return to their homes at night. The burdens of proving lack of due care and of defending against the bar of contributory negligence are jettisoned by this judicial legislation. Where there is the slightest support for causation the only question for the jury is the amount of damages.

It may be argued that the initiative taken by the federal courts in imposing absolute liability is justified by their peculiar historical responsibility for admiralty law. And we are told that certain harbor workers come within the ambit of the warranty of seaworthiness because a shipowner cannot escape liability by delegating to others what is traditionally seamen's work. *Seas Shipping* v. *Sieracki*, 328 U. S. 85, 95 (1946). Here we go further. When a lower court charges on both seaworthiness and negligence toward a business invitee, we must assume that the only justification for the charge on seaworthiness is that the shipowner may be found liable despite his own due care. By assimilating certain activities to maritime law, we extend the absolute liability of shipowners, in effect, beyond the shipyard gates. The owner, despite the utmost care, is liable for the activities of a specialist employed expressly because these activities were beyond the range of experience and competence of the ship's crew. These circumstances rebut the contention that the shipowner is nullifying his liability by parcelling out ship's work to others.

The anomaly of the result reached here is pointed up when we consider the restricted liability of the specialist's employer, who is in the most favorable position to reduce the incidence of injury. Unlike the shipowner, the immediate employer's liability is restricted to the insurance ex-

penses of workmen's compensation or to damages incurred due to his lack of due care. Although the shipowner was not Halecki's employer and this was essentially an industrial injury resulting in the death of a shore-based electrician, an absolute liability of judicial creation is imposed upon the shipowner above and beyond the system developed by New Jersey to compensate for industrial accidents. I had thought that such far-reaching changes in rights and legal duties were solely within the province of the elected representatives of the people in Congress and not the proper business of judges. The traditional responsibility of the federal judiciary for admiralty does not justify such an expansion of liability.

Halecki risked all the hazards of the sea as one might experience them on a Saturday in late September while the ship was made fast to a bulkhead in Jersey City. He was not a seaman, he was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed. Whatever reasons there may be for extending the warranty of seaworthiness to stevedores or other harbor workers who work on board, they do not apply to those employed to do a special job of such a dangerous and unusual nature that it is beyond the competence of ship and shipyard, necessitates the removal and exclusion of the crew, and requires bringing extra equipment aboard for the safe performance of the hazardous activity.

The case of *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (9 Cir. 1956) cert. den. 354 U. S. 938, is authority for the proposition that when the manner of doing the work is foreign to what the ship's crew could do and involves the use of equipment not used or known on ships, there is no warranty of seaworthiness running to those who are injured in the course of doing such work by reason of any defect in the equipment so used. In that case the plaintiff was injured by the shattering of a grinding wheel brought

on board by his employer, Todd Shipyards Corporation, for use in repairs being made on the "shaft keyway" on defendant's ship. The Court of Appeals held there was no warranty of seaworthiness with respect to the grinding wheel. Judge Barnes pointed out that to hold otherwise would go beyond the *Sieracki, Hawn* and *Petterson*[2] cases as the grinding wheel was equipment that the ship could do without, and the shipowner may never have had any reason to know that such equipment existed. That the kind of equipment used is foreign to the vessel is just another way of saying that the work done is not the kind of work normally done by seamen.

My brothers say that this work was merely cleaning a generator and, as cleaning propulsion machinery is the kind of work which seamen would normally do, cleaning a generator is seamen's work and those who do it are entitled to a warranty of seaworthiness. This assimilates spraying with carbon tetrachloride to all cleaning as if it were harmless and commonplace; it is a play on words which by a characterization avoids dealing with a difference in means which completely destroys the validity of the syllogism. Because seamen may be able to do some kind of cleaning does not make seamen of those who do another kind of cleaning which seamen have never done and cannot do; nor does it supply any reason why an outside specialist should be treated, or needs to be treated, like a seaman.

That such general characterization is not a solution is emphasized by *Berge* v. *National Bulk Carriers Corp.*, decided this day. There the same panel of this court holds unanimously that there is no warranty of seaworthiness

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[2] *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953); *Petterson* v. *Alaska S. S. Co.*, 205 F. 2d 478 (9 Cir. 1953), aff'd per curiam 347 U. S. 396 (1954).

to a rigger, engaged in installing a tank bulkhead in the course of rebuilding a vessel, who was injured when the shearing of a defective shackle pin caused a chain tackle to fall and knock him from a scaffold. What Halecki did was no more the kind of work that the crew of a vessel was accustomed to do than was what Berge was doing. Indeed, it was less so. One might characterize Berge's work as lowering a heavy load into the hold, a normal seaman's duty done without abnormal risk of harm. Halecki's work was entirely novel and foreign to what seamen had ever done and far more dangerous to anyone who might be aboard. As in *Berge*, the work required the cessation of ship's operations and the removal of the crew.

Passing this point, I must also dissent from the majority's view that under the New Jersey Death Statute, N. J. S. 2A:31-1 (1952), a maritime claim, such as Halecki's, is not subject to the defense of contributory negligence. There is no basis for saying that the New Jersey legislature meant to abandon the defense of contributory negligence in such cases and it seems to me there is every reason as a matter of common sense and usual practice for saying that they did not mean these cases to be on a different basis. I would adopt the views of *Curtis* v. *Garcia*, 241 F. 2d 30 (3 Cir. 1957). Furthermore, it is difficult enough for admiralty lawyers and judges to keep up with the changes and developments in this field without expecting the members of a state legislature, few if any of whom are admiralty lawyers, to take over sight unseen whatever may be held to come along in the kaleidoscope of maritime rights, as against the doctrine of contributory negligence with which New Jersey and her lawyers have long been familiar. To hold otherwise seems to me to embrace a pure fiction for the purpose of implementing "humanitarian policy."

To refuse to extend the warranty of seaworthiness to Halecki and incorporate by reference comparative negligence into the New Jersey Death Statute would not leave

persons in the position of Halecki's survivors without a remedy. Besides the remedies against the employer normally incident to death by industrial accident in New Jersey, see R. S. 34:15-1, 34:15-7, 34:15-8, 34:15-9, R. S. Cum. Supp. 34:15-4, such persons apparently may alternatively elect to proceed against decedent's employer under the Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. A. § 901 *et seq.* See *Davis* v. *Dept. of Labor and Industries of Washington*, 317 U. S. 249 (1942); *Dunleavy* v. *Tietjen & Lang Dry Docks*, 17 N. J. Super. 76, 85 A. 2d 343 (Cty. Ct. 1951), aff'd 20 N. J. Super. 486, 90 A. 2d 84 (App. Div. 1952). Nor does our refusal foreclose actions against the shipowner or the shipyard for their failure to exercise due care. Indeed such an action was brought by this appellee against Rodermond Industries for its alleged negligence in the events which led up to Halecki's death. Moreover our refusal in this action would permit retrial of the cause against the shipowner on the theory of negligence.

I would dismiss so much of the complaint as relies on a warranty of seaworthiness, and reverse and remand for a new trial on the issue of negligence.

SUPREME COURT. U. S.
SEP 5 1958
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1958

No. 43

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

against

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

and against

EL DORADO OIL WORKS,

Respondent-Impleaded.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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Supreme Court of the United States

October Term, 1958

No. 43

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBS-AKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

Opinions of the Courts Below

The opinion of the United States District Court for the District of New Jersey (Alfred E. Modarelli, U. S. D. J.), dismissing the libel is reported at 141 F. Supp. 653, and is set forth on pages 570-577 of the Record.

The majority opinion of the United States Court of Appeals for the Third Circuit (Chief Judge Biggs and Circuit Judges Goodrich, McLaughlin and Staley) and the dissenting opinion (Circuit Judges Maris, Kalodner and Hastie) are reported at 252 F. 2d 14 and are set forth on pages 582-596 of the Record.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 23, 1957.

The petition for a writ of certiorari was filed on March 24, 1958, and was granted June 9, 1958.

The jurisdiction of this Court to grant the writ of certiorari is provided by Title 28 U. S. Code, Section 1254(1).

Questions Presented

1. Whether a federal court may engraft concepts of liability peculiar only to the federal maritime law upon the wrongful death act of a state in the absence of any state statutes or authorities incorporating such concepts into that act?

2. Whether a federal court may attribute to the legislature of a state an *in futuro* intent to incorporate into the wrongful death act of that state substantive provisions of the federal maritime law when there is total lack of evidence of such intent on the part of that legislature either at the time of enactment or at any later date?

3. Whether, in any event, a shipowner owes a warranty of seaworthiness to a repairman, employed by an independent contractor, as to an obvious condition aboard the vessel created by a failure of the contractor's equipment, which very equipment he comes aboard to repair?

4. Whether a shipowner is under a duty to provide a safe place to work to a repairman employed by an independent contractor with respect to obvious conditions created aboard the vessel by the failure of the contractor's equipment, when the repairman comes aboard the vessel to repair that equipment with full knowledge of the facts?

The Statute Involved

The libellant sued in the United States District Court for the District of New Jersey to recover damages under the New Jersey Wrongful Death Act, Rev. Stat. N. J. 2A:31-1 *et seq.*; N. J. S. A. 2A:31-1 *et seq.*, the relevant section which read as follows:

> "2A:31-1. When Action Lies
>
> When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

• • •

Statement

The libelant-respondent filed a libel (R. 3) in the United States District Court for the Southern District of New York to recover damages for the death of her husband, which occurred aboard m/v Tungus on December 6, 1952 while that vessel was moored in Bayonne, New Jersey. The deceased was an employee of El Dorado Oil Works, the respondent-impleaded, at the time of his death (R. 5, 129, 227). Four causes of action were set forth in the libel.

The first two sought to recover under the New Jersey Wrongful Death Act (Rev. Stat. N. J. 2A:31-1 *et seq.*; N. J. S. A. 2A:31-1 *et seq.*). The third and fourth causes of action in the libel sought to recover for the damages which had accrued to the deceased in terms of conscious pain and suffering, medical expenses, etc., presumably under the New Jersey Survival Statute (Rev. Stat. N. J. 2A:15-2; N. J. S. A. 2A:15-2), since such damages are not recoverable under the Wrongful Death Act.

The petitioners, the owners of m/v Tungus, successfully moved for a change of venue to the United States District Court for the District of New Jersey in order to permit them to serve an impleading petition upon El Dorado Oil Works (R. 33).

The chronological facts giving rise to the admiralty suit in the District Court were as follows:

In October, 1952, in the Philippines, m/v Tungus, a dry cargo merchant vessel owned by the petitioners, took on board two shipments of coconut oil in bulk, which were loaded into the two deeptanks (R. 293, Exh. R-6, R. 557, 297) in No. 3 shelter deck. In accordance with the terms of the contract of carriage this coconut oil was loaded at the expense of and with the equipment of the shipper (R. 314). The contract for the carriage of the oil also specified that the oil was to be discharged at the "sole risk and expense of the consignee," and that the consignee was also obligated to provide necessary equipment for the discharge (R. 314).

Upon the arrival of m/v Tungus in New York in December, 1952, the respondent-impleaded, El Dorado Oil Works, received instructions from the then owner of the coconut oil in the port deeptank to discharge the oil from that tank into El Dorado's storage facilities in Bayonne, New Jersey (R. 54, 55, 60, 61, 298, 570). The m/v Tungus was accordingly ordered to proceed from its own pier in Brooklyn to El Dorado's pier in Bayonne (R. 298).

Prior to the arrival of the vessel in Bayonne the deceased, who was Maintenance Foreman for El Dorado Oil Works, checked the operating condition of an electric centrifugal pump, owned by El Dorado (R. 57, 58, 62, 246), which was to be used by that company to discharge the oil. He was apparently "satisfied that she was in good working condition" (R. 246-7, 453, 454).

Upon the arrival of the vessel at El Dorado's pier in Bayonne, New Jersey, at approximately 5 p.m. on December 5, a survey of the oil in the port deeptank was made by Mr. Mallett, a surveyor representing the vessel, and by Mr. Sexton, El Dorado's Receiving and Shipping Foreman (R. 259, 260, 481). One officer and two members of the ship's crew assisted the El Dorado personnel in loading the discharging pump aboard the vessel. The two crew members were employed in driving the ship's winches (R. 299, 300). Under the direction of the El Dorado workers and by means of the winches, the lid of the port deeptank was first lifted, rotated 90 degrees, and then placed on top of the deeptank coamings (R. 239, 260, 261, 457). The placement of the tank lid can be seen in Exh. L-9 (R. 151) and Exh. R-2 (R. 258). El Dorado's pump, which had been lying on the pier, was then lifted by means of the ship's winches and lowered into No. 3 hatch and placed on top of the port deeptank lid (R. 457-458). The placement of this pump was directed by the El Dorado personnel (R. 239; interrogatory No. 15, R. 427; R. 457, 460).

The Trial Judge, in an opinion which constituted his findings of fact (R. 576), described this phase of the operation as follows:

> "Under the supervision of the El Dorado workers, two of the ship's crew operated winches; they were aided by one officer of the ship; the port deeptank lid was lifted, rotated 90 degrees, and lowered to a position across the top of its coamings, so that the after third of the tank was opened. The El Dorado workers were satisfied with the position of the tank

> lid. A pump, owned by El Dorado, was lifted by the ship's winches and lowered into No. 3 shelter deck and placed on top of the port deeptank lid under the directions of an El Dorado worker. He also directed the rigging of the suction discharge hoses." (R. 570-1)

The El Dorado pump crew started discharging the oil from the port deeptank at about 8 p. m. (Exh. R-4, R. 554, 266; Exh. R-6, R. 560, 297).

The discharge of the oil from the deeptank was under the direct supervision and control of El Dorado personnel (R. 157, 187, 221, 229, 261, 430, 497). The Trial Court so found in its opinion (R. 570, 576).

Mr. Patrick Sexton, the receiving and shipping foreman for El Dorado was in charge of the discharging. Mr. Blaney, the Plant Superintendent for El Dorado testified as follows:

> "Q. And there is no question that this complete discharging was under your man, Patrick Sexton, is that right? A. There is no question." (R. 430)

Shortly after midnight on the morning of December 6, 1952, one of the officers of the vessel, while making a routine tour of the decks, looked down into the open shelter deck of No. 3 hatch and saw that the pump had burst and that tons of hot liquid coconut oil were being pumped directly into the shelter deck area (R. 188, 268, 304; Exh. R-4, R. 554, 266; Exh. R-6, R. 560, 297). At that time none of the El Dorado pump crew were in attendance, much less even aboard the vessel (R. 304; Exh. R-6, R. 560, 298).

In answers to interrogatories it was admitted by respondent-impleaded El Dorado that one member of the El Dorado pumping crew was *required* to remain on duty in number 3 shelter deck of the vessel to maintain a constant watch on the pump itself (R. 57, 62).

As a result of this failure of El Dorado's pump, liquid coconut oil covered the entire area of No. 3 shelter deck, including the top of both the port and starboard tank lids, the area forward of the tank coamings, and the area between the port and starboard tank coamings, and covered as well two steel hatch beams which were lying in a fore and aft direction between the port and starboard coamings (R. 143, 152, 153, 177, 190, 191, 269, 275, 276, 329, 346, 495, 505).

When this pump failure was discovered it was necessary for an officer to go ashore in order to find an El Dorado employee to turn off the pump, which in the meantime continued to pump oil into the general cargo spaces in No. 3 hatch (R. 188, 304). The pump was finally turned off by an El Dorado employee (R. 188, 304), and a wooden plug was driven into the fractured air injection nipple of the pump, where the failure had occurred (R. 188). The broken fitting was replaced by Donahue and Russo, two El Dorado employees (R. 155, 194), but not before they had squeegeed or pushed away the spilled oil in the working area around the pump (R. 155, 176-7, 199, 144, 491-3, 495). None of the El Dorado employees on duty, however, were able to regain pumping suction (R. 156, 196), because, as it later proved, the distance between the pump and the oil level in the deep tank was too great to regain suction. It was finally necessary to lower the pump into the partially open tank (R. 235, 240, 433, 473-5). In this manner the suction line length was reduced to the point where the pump was able to regain suction. Mr. Blaney testified that any stoppage of the pump at that stage of the discharge would necessitate lowering the pump into the partially open tank (R. 235) in order to regain suction. This fact explains why it was not possible to discharge the tank through the small manhole in the lid (R. 277-8). The Trial Court found that it was necessary to have the tank open (R. 575).

As a result of this inability to resume pumping Carl Skovgaard, El Dorado's Maintenance Foreman, was called

from his home in the middle of the night. It will be recalled that Skovgaard was the one who had checked the operation of the pump prior to the arrival of the vessel at the pier the previous afternoon. At least two El Dorado employees claimed that they were the ones who had called Skovgaard at his home by telephone (R. 156-7, 507). Skovgaard was told about the conditions existing in No. 3 shelter deck by Patrick Sexton, the El Dorado foreman (R. 507). Donahue also testified that it was he who telephoned Skovgaard and told him "about the condition of the pump, and the trouble we were having" (R. 156-7).

After having been so summoned, the deceased left his home and shortly later boarded the m/v Tungus. The deceased first observed the conditions in No. 3 shelter deck by looking down into the open hatch from the main deck level (R. 156-7). The deceased was then down in No. 3 shelter deck itself observing conditions for some 10 or 15 minutes before his death (R. 158, 219-20, 484-6).

The next sequence of events was found by the Trial Court to be as follows:

> "In moving from the foot of the ladder leading down from the main deck to the shelter deck, Skovgaard walked through the area over which the oil had spilled. As he walked aft of the port tank he stepped on either one or both of the hatch beams; then as he attempted to step onto the top of the tank, he slipped on the spilled oil and fell to his death into 8 feet of hot oil contained in the hatch opening of the port tank." (R. 573)

These findings find full support in the record (R. 158-9, 197, 225, 442, 486).

There is not one word of testimony in the record as to any request having been made by the deceased or by any other El Dorado employee to the officers or crew of the vessel to have the conditions in No. 3 shelter deck altered or remedied in any way either before or after the spill oc-

curred. As a matter of fact the El Dorado employees stated specifically that they were satisfied with the conditions and the placement of the equipment (R. 180-1, 461, 469, 491-3).

The Chief Officer of the vessel, Mr. Folkman, testified that after the pump's failure and before the arrival of the deceased aboard the vessel he had offered sand or sawdust to Patrick Sexton, the Receiving and Shipping Foreman of El Dorado, for spreading in the shelter deck, but that his offer was sharply refused (R. 305, 308-9, 331, 349). This offer finds substantiation in the vessel's log entry made pertaining to this entire incident (Exh. R—6, R. 560, 297). Mr. Sexton, however, when called as a witness, denied that any such offer was made by the Chief Officer (R. 484). His denial was rendered totally academic, since he also testified as follows:

> "Q. Now, as receiving clerk in charge of receiving the oil, it would be up to you to say whether or not anything could be put on that oil so it wouldn't be left slippery, isn't that so? A. That is so, yes.
>
> Q. And after inspecting that area you gave no instructions to the men that were working there, is that correct? A. In my opinion, at that time, I thought that the area was clean enough. They [El Dorado employees] had squeegeed it." (R. 493)

The foregoing testimony referred to the time between the pump's failure and the death of the deceased.

The plant Superintendent of El Dorado, Mr. Blaney, testified that the pump's air injection nipple had broken off as a result of "normal vibration" of the pump (R. 430), and admitted that the air injection nipple was not an integral part of the pump (R. 429-30), but had been added to the pump by El Dorado out of parts already in stock at the plant (R. 430).

Upon the foregoing facts this suit came on for trial in the United States District Court for the District of New

Jersey before District Judge Modarelli in November, 1955. On June 11, 1956 Judge Modarelli filed an opinion holding the petitioners not liable for the death of the deceased (R. 570-7). Judgment was accordingly entered dismissing the libel and consequently dismissing the impleading petition as well (R. 577). After libelant filed a notice of appeal to the United States Court of Appeals for the Third Circuit (R. 577-8), the petitioners filed a precautionary notice of appeal to the same Court from the dismissal of the impleading petition in order to preserve their rights under the impleading petition (R. 579-80).

Both appeals were argued in the United States Court of Appeals for the Third Circuit on February 8, 1957 before Circuit Judges McLaughlin, Staley and Hastie. On June 27, 1957, the Court of Appeals handed down an order calling for reargument of the appeals before the Court *en Banc* (R. 580-1). On October 22, 1957 the appeals were reargued before the full bench of seven judges.

On December 23, 1957 the opinion of the Court was filed and judgment entered (R. 681-97). The majority of four, consisting of Chief Judge Biggs and Circuit Judges Goodrich, McLaughlin and Staley called for a reversal of the judgment of the District Court on the grounds that the respondents owed a warranty of seaworthiness to the deceased and were in addition under a duty to provide him with a safe place to work. The dissenting minority of three, consisting of Circuit Judges Maris, Kalodner and Hastie felt that the majority of the Court had injected into the New Jersey Wrongful Death Act liability defining concepts peculiar only to and borrowed from the federal maritime law, and that since the federal maritime law afforded no rights (the deceased having died in state waters) such borrowing was improper. It was also the opinion of the minority that the seaworthiness of the vessel could not have been warranted to the deceased and under the New Jersey cases there could have been no breach of duty

to the respondents to provide the deceased with a safe place to work, since the danger was obvious to the deceased and since he came aboard to repair and restore to operation the very pump which had caused the oil spill.

Petitioners thereupon filed a petition for a writ of certiorari in this Court on March 24, 1958. On June 9, 1958, an order was entered allowing certiorari (R. 597).

Summary of Argument

The identities of the parties to this suit were as follows: The petitioners were the owners of the Norwegian m/v Tungus, a merchant vessel designed for the carriage of dry cargo, but having two deeptanks in her No. 3 shelter deck suitable for the carriage of oils in bulk. The respondent is the widow of Carl Skovgaard, deceased, who was Maintenance Foreman for El Dorado Oil Works. Respondent-impleaded El Dorado Oil Works was the employer of the deceased and had its employees aboard m/v Tungus on orders of the owner of the shipment of oil being carried in the port deeptank of the vessel. El Dorado was *not* engaged by petitioners, but by the consignee of the shipment, and El Dorado employees were aboard for the purpose of discharging the oil using their own equipment and personnel.

During the discharge of the shipment of coconut oil by El Dorado, which took place at El Dorado's pier in Bayonne, New Jersey, El Dorado's electrical discharging pump ruptured, causing several tons of hot liquid oil to be pumped directly into the shelter deck area where the El Dorado employees were supposed to be working. When El Dorado's pump crew could not get the pump operating again, they summoned the deceased from his home. The deceased boarded the vessel in the middle of the night, and after observing conditions from the main deck level, went down into No. 3 shelter deck in order to assist directly in

the further repairs of the pump. While in the close vicinity of the pump and while approaching the tank lid on which the pump had been placed the deceased slipped on the spilled oil and fell to his death into the deep tank.

His widow instituted a suit in admiralty in the United States District Court setting forth four causes of action, two under the New Jersey Wrongful Death Act (Rev. Stat. N. J. 2A:31-1 *et seq.*; N. J. S. A. 2A:31-1 *et seq.*) and two under the New Jersey Survival Statute (Rev. Stat. N. J. 2A:15-2; N. J. S. A. 2A:15-2). Since no damages were proven which might be recoverable under the latter statute, the attention of the Courts was focused on the first and second action under the Wrongful Death Act.

The New Jersey Wrongful Death Act predicates liability upon a "wrongful act, neglect or default" and, upon proof of such liability, awards damages in the form of compensation for "the pecuniary injuries resulting from such death".

Since the deceased met his death on navigable waters within the jurisdiction of one of the states, the substantive federal maritime law afforded no rights to his widow. *The Harrisburg,* 119 U. S. 199 (1886). Whereas the United States District Court, in admiralty, had jurisdiction to entertain the suit (*Western Fuel Co.* v. *Garcia,* 257 U. S. 233 (1921)), the fact that the forum was a United States District Court, in admiralty, did not alter the fact that liability had to be determined solely by reference to the substantive provisions of the laws of the State of New Jersey and the decisions of the various Courts of the State of New Jersey. *Western Fuel Co.* v. *Garcia,* 257 U. S. 233 (1921); *Levinson* v. *Deupree,* 345 U. S. 648 (1952).

The Trial Court held that the doctrine of unseaworthiness afforded no basis for a recovery by the respondent against the owners of the vessel, and held further that the owners of the vessel were not liable to the deceased or the

respondent under theories of negligence. The United States Court of Appeals for the Third Circuit in a 4-3 decision (sitting *en banc* on a reargument of the appeal), reversed the decision of the Trial Court. The majority bench of the United States Court of Appeals, while stating that respondent's rights in seeking redress for the death of her husband were necessarily limited to those under the New Jersey Wrongful Death Act, proceeded to hold that petitioners owed a warranty of seaworthiness to the deceased and further held that petitioners were under a duty to provide the deceased with a safe place in which to work. In support of these propositions the majority bench cited cases involving injured workers, who had rights under the federal maritime law and who were proceeding under that law rather than under any state statutes. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406 (1953). We submit that there is not the slightest connection between the law as set forth in those two cases and the cases in the Courts of the State of New Jersey under which this suit must necessarily be decided.

There are no authorities in New Jersey which warrant the inclusion of a warranty of seaworthiness in the words "wrongful act, neglect or default", as used in the Wrongful Death Act of New Jersey. There is nothing that would indicate that the legislature of the State of New Jersey, when it enacted the Wrongful Death Act in 1848, with the same language, intended that warranties or theories of absolute liability without fault should form a basis for liability under the Act. Nor is there anything in the cases or the laws of the State of New Jersey which would indicate that it was the intention of its legislature to formulate a double standard—one creating liability for matters occurring ashore and the other creating different liabilities for matters occurring afloat on the navigable waters of the State.

The warranty of seaworthiness derives from the federal maritime law (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85

(1946); *Kernan* v. *American Dredging Co.*, 355 U. S. 426 (1958)), and is a species of liability wholly alien to concepts of fault or negligence. Unseaworthiness has never been a basis for a recovery under the Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. § 761, which uses the identical words "wrongful act, neglect or default". In *Dalehite* v. *United States*, 346 U. S. 15 (1953), this Court held that the words "wrongful act" in the Federal Tort Claims Act, 60 Stat. 842, 62 Stat. 869, 992, 28 U. S. C. § 1346(b), did not include theories of absolute liability without fault. The warranty of seaworthiness is a form of absolute liability which has been imposed by the federal maritime law upon those engaging in maritime services predicated upon the hazards of such service (*Seas Shipping Co.* v. *Sieracki, supra*). Since the federal maritime law affords no rights to this respondent, and since the New Jersey Wrongful Death Act makes no provisions for a recovery predicated upon warranties of seaworthiness, the respondent is necessarily limited to alleging negligence in seeking a recovery under that Act.

Even if this suit were to be decided under the federal maritime law, no warranty of seaworthiness would be owed to the deceased with respect to the conditions which proximately caused his death. The allegations of unseaworthiness would necessarily be pointed at either the broken pump of El Dorado or the oil spill which that pump created in breaking down. In either event the petitioners made no warranty of fitness or seaworthiness to the deceased, and the deceased himself was fully aware of the defective and broken condition of the pump, having come aboard for the purpose of repairing it, and was also fully aware, both from having been told and from personal observation, of the existence of the oil spill in the No. 3 shelter deck, where the pump was located.

The Courts of Appeals for the Second and Third Circuits have held in similar fact situations that no warranty

of seaworthiness was owed to the injared man. *Byars* v. *Moore-McCormack Lines*, 155 F. 2d 507 (2 C. A. 1956); *Bruszewski* v. *Isthmian S.S. Co.*, 163 F. 2d 720 (3 C. A. 1947), cert. den. 333 U. S. 828 (1948).

Finally, we submit that the testimony in the record makes it clear that the repair of El Dorado's pump and the discharge of the oil was under the supervision and control of El Dorado and not under the supervision or control of the officers or the members of the crew of the vessel. The finding of the Trial Court to that effect was not held to be "clearly erroneous" by the United States Court of Appeals, and the finding of the Trial Court is fully supported in the record. Trial testimony referred to in the body of this brief points to the fact that the efforts of the Chief Officer to suggest corrective measures after the oil spill occurred (and before the death of the deceased) were rebuffed by El Dorado's supervisor. This supervisor conceded that the decision as to whether to spread sand or sawdust on the spilled oil was his to make and his alone. Since he was at that time of the opinion that no such measures were necessary, the No. 3 shelter deck, where the pump was located, was left as is, except for the fact that the El Dorado pump crew swept away some of the spilled oil from the immediate working area around the pump.

On such a set of facts the Courts of the State of New Jersey would hold that no duty would be owing to one in the category of the deceased, who not only came aboard to repair the very instrumentality which had caused the spill, but was also fully aware of the existing conditions. *Broecker* v. *Armstrong Cork Company*, 128 N. J. L. 3, 24 A. 2d 194 (1942); *Mergel* v. *Colgate-Palmolive-Peet Co.*, 41 N. J. Super. 372, 125 A. 2d 292 (1956); *Newbury* v. *American Stores Co.*, 115 N. J. L. 604, 180 Atl. 75 (1935).

Since the respondent can look only to the law of the State of New Jersey for a determination of her rights to recover for the death of her husband, the aforementioned

cases in New Jersey Courts are determinative of her rights. Under them it is obvious that if this matter had been tried in one of the Courts of the State of New Jersey, recovery would have been denied to her. Since even the majority of the United States Court of Appeals below conceded that the respondent had no rights other than under the laws of the State of New Jersey, their conclusion that the petitioners were liable to the respondent in terms of unseaworthiness and negligence flies in the teeth of the New Jersey decisions. As stated in *Garrett* v. *Moore-McCormack*, 317 U. S. 239, 245 (1942):

> " • • • and admiralty Courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State".

POINT I

The respondent is limited to a suit under the laws of the State of New Jersey.

The deceased, Carl Skovgaard, while employed by the respondent-impleaded, El Dorado Oil Works, met his death aboard m/v Tungus, a vessel owned by petitioners, while that vessel was moored at El Dorado's pier in Bayonne, New Jersey.

As such, the respondent, his personal representative and his widow, in suing to recover for his death, is necessarily limited to any causes of action which may be given to her by the laws of the State of New Jersey.

The respondent cannot proceed against the petitioners under the Jones Act, 41 Stat. 1007, 46 U. S. C. Section 688, not only because the deceased was not a member of the crew of m/v Tungus, but also because he was not employed by the petitioners, the owners of that vessel. As was held by this Court in *Cosmopolitan Shipping Company* v. *Mc-*

Allister, 337 U. S. 783 (1949), the Jones Act affords a right of recovery only against the employer, and the relationship of employer-employee must be shown to exist. In *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1 (1946) and *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370 (1957) this Court has also held that since passage of the Longshoreman's and Harbor Worker's Compensation Act of March 4, 1927, 44 Stat., 1424, 33 U. S. C. Section 901 *et seq.*, the benefits of the Jones Act have been restricted to members of the crew of the vessel. The Jones Act affords no basis for a recovery in the instant case.

A further statutory provision giving rights of action in maritime deaths is the Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. Section 761 *et seq.* The Death on the High Seas Act, however, gives a cause of action only when "the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore" (46 U. S. C. Section 761). Carl Skovgaard met his death aboard m/v Tungus in waters under the jurisdiction of the State of New Jersey, and not on the high seas beyond a marine league from shore. The Death on the High Seas Act specifically left untouched a fact situation like the one presented, for in 46 U. S. C. Section 767 it is stated:

> "The provisions of any State giving or regulating rights of action or remedies for death shall not be affected by this chapter. * * * "

This section indicates the intention of Congress not to interfere with legislation of the States in the field of death occurring on waters within the jurisdiction of those States.

Finally, neither the common law nor the federal maritime law provide rights in the case of death. The rule under both the common law and the federal maritime law has always been and still is that the right of action, if any, dies with the person. This principle is well supported by

authorities, both in this Court and in the Courts of Appeal of the various circuits.

The most recent reference to the point is to be found in *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 428 (1958), when Mr. Justice Brennan wrote:

> "But the remedy for unseaworthiness derives from the general maritime law, and that law recognizes no cause of action for wrongful death whether occasioned by unseaworthiness or by negligence."

On this particular point the four dissenting Justices of this Court concurred (355 U. S. 441).

These principles were enunciated by this Court as early as 1886 in *The Harrisburg*, 119 U. S. 199 (1886). This involved a suit *in rem* begun in the United States District Court for the Eastern District of Pennsylvania against the steamer Harrisburg by a widow to recover damages for the death of her husband allegedly caused by the negligence of that steamer in collision with another vessel. Mr. Chief Justice Waite at 119 U. S. 204 phrased one of the questions presented as follows:

> "1. Can a suit in admiralty be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea, caused by negligence, in the absence of an act of Congress, or a statute of a State, giving a right of action therefor?"

After a most thorough review of earlier authorities Mr. Chief Justice Waite wrote at page 213:

> "Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in

matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule."

Later this proposition was reaffirmed in *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 240 (1921). That recovery for death cannot be had under the federal maritime law was restated by Mr. Chief Justice Hughes in *Just* v. *Chambers*, 312 U. S. 383, 391 (1941). To the same effect is the opinion of Mr. Justice Frankfurter in *Levinson* v. *Dupree*, 345 U. S. 648, 650 (1952).

It is apparent, therefore, that this respondent is limited in seeking recovery for the death of her husband, to whatever rights may be afforded to her under the statutes and laws of the State of New Jersey in whose jurisdiction the deceased met his death.

The majority opinion below as written by Circuit Judge Staley professed to recognize this limited basis for recovery by the respondent and recited the fact that redress for the death of Skovgaard would have to be based upon the statutes of New Jersey, more specifically the New Jersey Wrongful Death Act, Rev. Stat. N. J. 2A:31-1 et seq.; N. J. S. A. 2A:31-1 et seq. (R. 583).

We submit, however, that the majority of the bench below actually lost sight of the fact that no cause of action was given under the federal maritime law, and proceeded to dispose of the suit under that very law, holding that the respondent was entitled to recover on the basis of unseaworthiness of the vessel and under negligence principles set forth in various cases, which were in fact adjudicated under the federal maritime law.

POINT II

The jurisdiction of the District Court to entertain this suit in admiralty did not alter the fact that the Court was required to apply New Jersey law just as though the action had been brought against the petitioners in one of the courts of the State of New Jersey.

The right of the United States District Court, sitting in admiralty, to entertain this libel *in personam* under the New Jersey Wrongful Death Act is supported by such authorities as *Western Fuel Co.* v. *Garcia,* 257 U. S. 233 (1921) and *Just* v. *Chambers,* 312 U. S. 383 (1940).

In *Western Fuel* v. *Garcia,* Mr. Justice McReynolds wrote as follows at 257 U. S. 242:

> "As the logical result of prior decisions we think it follows that, where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given."

In *Just* v. *Chambers,* 312 U. S. 383 (1941), Mr. Chief Justice Hughes referred to the fact that a right of action for death was denied by the federal maritime law, and in referring to the earlier authorities on that point wrote at page 388:

> "The absence of a federal or state statute giving a right of action was emphasized. But when a State, acting within its province, has created liability for wrongful death, the admiralty will enforce it."

It being established that the United States District Court, in admiralty, was empowered to entertain the suit despite the fact that no right of action was given other

than under the laws of the State of New Jersey, the question arises as to what federal or state substantive principles are to be applied by that Court in determining the rights of the parties to the suit. Circuit Judge Hastie, in his dissenting opinion in the instant matter (R. 589), outlined the situation in the following terms:

> "A federal court is here asked to enforce a cause of action, the existence and dimensions of which are determined solely by the law and policy of New Jersey. True, the United States District Court which heard this case was sitting 'in admiralty'. But for present purposes this is significant only in that the practice properly followed in that forum is admiralty practice. Thus, the proper form of complaint in this case was a libel in the admiralty style. The shipowners could be reached by attaching the vessel in the classic admiralty manner. But beyond such matters of legal administration, the substantive concepts of admiralty had no effect as law in defining the claim. State law and it alone performed that function. Admiralty was merely the administering forum in a situation in which the maritime law itself did not even provide a cause of action for wrongful death."

In so writing Circuit Judge Hastie referred to the case of *Levinson* v. *Deupree*, 345 U. S. 648 (1952), where this Court held that a United States District Court, sitting in admiralty, in a suit under the Wrongful Death Act of Kentucky was bound to enforce a substantive provision of the laws of Kentucky

> "as it found it, but not bound beyond that to strive for uniformity of results in procedural niceties with the Courts of the jurisdiction which originated the *obligatio*."

This principle was not new having been enunciated by this Court earlier in *The Harrisburg, supra,* and *Western Fuel Co.* v. *Garcia, supra,* where this Court held that limitations which would bar a suit under the state law,

had the suit been instituted in a court of that state, would also serve to bar the suit, which was in fact brought in admiralty in the United States District Court.

Mr. Justice Black discussed the point in *Garrett* v. *Moore-McCormack*, 317 U. S. 239, 245 (1942):

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State."

The Third Circuit had until now maintained an unbroken line of adherence to the idea that guiding principles of applicable state law were to be applied by a District Court sitting on an action under the wrongful death act of a state. *Klingseisen* v. *Costanzo Transportation Co.*, 11 F. 2d 902 (3 C. A. 1939), *The H. S. Inc.*, No. 72, 130 F. 2d 341 (3 C. A. 1942), *Curtis* v. *Garcia Y Cia.*, 241 F. 2d 30 (3 C. A. 1957) and *Hill* v. *Waterman*, 281 F. 2d 655 (3 C. A. 1958).

Judge Borah of the United States Court of Appeals for the Fifth Circuit adhered to the principle in *Graham* v. *A. Lusi Ltd.*, 206 F. 2d 223 (5 C. A. 1953). To the same effect is the decision of the same Court in *Byrd* v. *Napoleon Avenue Ferry Co.*, 125 F. Supp. 573 (E. D. La., 1954), affirmed on opinion below, 227 F. 2d 95 (5 C. A. 1955), cert. den. 351 U. S. 925 (1956).

In short, the obligation of the United States District Court for the District of New Jersey and of the United States Court of Appeals for the Third Circuit was to dispose of the suit under the same principles and with the same results which would have obtained had this respond-

ent instituted suit against the petitioners in one of the Courts of the State of New Jersey. The principles of New Jersey negligence law must prevail. Since no federal statutes are involved and since the federal maritime law provides no rights, the law of the State of New Jersey stands alone and unchallenged. Those cases involving injuries in which the state law has been required to bow to applicable and therefor overriding federal maritime law are not in point.

POINT III

The respondent is not entitled to proceed against the petitioners on the grounds of the alleged unseaworthiness of the vessel, not only because the right to recover for unseaworthiness derives from the Federal Maritime Law, but also because the breach of a warranty of seaworthiness is not a wrongful act, neglect or default.

The four majority Judges in the United States Court of Appeals for the Third Circuit, in an opinion by Circuit Judge Staley have held that

> "The failure to provide a seaworthy vessel in the case before us is such 'wrongful act, neglect or default' as will allow recovery under New Jersey wrongful death statute." (R. 586)

In so holding the majority bench below have ignored the decisions of this Court which have held that the warranty of seaworthiness derives from the general maritime law and bears no similarity to concepts of negligence liability.

In *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), Mr. Justice Rutledge wrote extensively on the nature of the warranty of seaworthiness. The principal question before this Court was whether the warranty of seaworthi-

ness was to be extended to a longshoreman injured while working aboard a vessel even though the injured man was not an employee of the owners. At the risk of quoting too familiar language we respectfully refer this Court to what was written at 328 U. S. 92:

> "It is true that the liability for unseaworthiness is often said to be an incident of the seaman's contract. But in all instances which have come to our attention this has been in situations where such a contract existed. Necessarily in such a setting the statement could have no reference to any issue over liability in the absence of such a contractual relation. Its function rather has been to refute other suggested restrictions which might be held to apply on the facts. Most often perhaps, these have been limitations arising from *the erroneous idea that the liability is founded in negligence* and therefore may be defeated by the common-law defenses of contributory negligence, assumption of risk and the fellow-servant rule." (Emphasis supplied.)

In further describing the nature of unseaworthiness the Court wrote at page 94:

> "It [unseaworthiness] is essentially *a species of liability without fault*, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, *the liability is neither limited by conceptions of negligence* nor contractual in character." (Emphasis supplied.)

In *Boudoin* v. *Lykes Bros. SS. Co., Inc.*, 348 U. S. 336, 339 (1955), Mr. Justice Douglas in delivering the opinion of the Court wrote:

> "The warranty of seaworthiness does not mean that the ship can weather all storms. It merely means that 'the vessel is reasonably fit to carry the cargo'. *The Sylvia*, 171 U. S. 462, 464; *The Southwark*, 191 U. S. 1, 9. If it is not, the owner is liable, irrespective of any fault on his part. *The Osceola*, supra; *Seas Shipping Co.* v. *Sieracki*, supra."

In *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406 (1953), Mr. Justice Black in commenting upon the origins of the warranty of seaworthiness wrote at 346 U. S. 409 as follows:

> "His right of recovery for unseaworthiness and negligence is rooted in federal maritime law."

Mr. Justice Frankfurter, in the same case, wrote a concurring opinion and on this point stated:

> "The right of seamen to recover for unseaworthiness is peculiarly a cause of 'admiralty and maritime jurisdiction', 1 Stat. 73, 77. The right is in the nature of liability without fault for which contributory negligence is not a bar to recovery although it may be relevant in assessing the damages. * * * We should not commingle federal admiralty and state common law and should not engraft onto the federally created right to recover for unseaworthiness a common-law defense foreign to that right". (346 U. S. 415)

Most recently, Mr. Justice Brennan commented upon the point in *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 428 (1958):

> "The petitioner urges first that the statutory violation made the flotilla unseaworthy, creating liability without regard to fault. But the remedy for unseaworthiness derives from the general maritime law, and that law recognizes no cause of action for wrongful death whether occasioned by unseaworthiness of by negligence."

The warranty of seaworthiness, therefore, is a creature of the general maritime law, restricted to maritime matters, having its roots in our federal maritime law, and partaking of none of the characteristics of negligence.

What justification is there, therefore, for Judge Staley's statement that "the New Jersey wrongful death statute adopts the maritime standard of care" (R. 588)? There is nothing in the decisions of the Courts of the State of

New Jersey, in the wording of the Wrongful Death Act itself or in the legislative history of the Act which would justify such a conclusion. It is significant that no authority has been cited by the majority of the United States Court of Appeals for the Third Circuit to justify the statement that the New Jersey Wrongful Death Act gave a cause of action for a breach of warranty of seaworthiness.

The New Jersey Wrongful Death Act with the original words "wrongful act, neglect or default" was enacted on March 3, 1948, some two years after the British Lord Campbell's Act (9 and 10 Vict. c. 93), on which the New Jersey statute was patterned. And yet the extension of the warranty of seaworthiness to those other than members of the crew of a vessel was not made until 98 years later in the decision of this Court in *Seas Shipping Co.* v. *Sieracki, supra.* As suggested in the dissenting opinion of Circuit Judge Hastie (R. 591) only bedlam can result if we are to ascribe to a state legislature an intention to incorporate interpretations of federal maritime law by our admiralty courts given almost a century after the legislation was enacted.

The decision of the United States Court of Appeals for the Third Circuit in the instant matter is totally unsupported by the law of the State of New Jersey in a situation where admittedly the laws of the State of New Jersey provide the sole right.

Light can be thrown on the meaning of the words "wrongful act, neglect or default" by reference to interpretations of other statutes using identical or similar language.

The opening section of the Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. § 761, reads as follows:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas * * * ".

The key words, of course, identical to those in the New Jersey Wrongful Death Act. It is most significant that a search of authorities and of decisions dealing with the Death on the High Seas Act has revealed no instance in which recovery under that Act has been predicated upon unseaworthiness of the vessel involved. Recovery has been limited strictly to acts of negligence.

A further Federal statute which is of assistance on this point is the Federal Tort Claims Act, 60 Stat. 842, 62 Stat. 869, 992, 28 U. S. C. § 1346 (b). That section of the Act states that the Federal District Courts, subject to the provisions of the Act, are to have:

> "* * * 'exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government * * *'".

It will be noted that the phrase "wrongful act" is used. Judge Staley, writing for the majority bench below, held that the breach of a warranty of seaworthiness was a "wrongful act" (R. 585). It might be noted that Judge Staley justified this interpretation by stating that:

> "It is the liability—creating quality of an act which makes it wrongful."

Reference to *Dalehite* v. *United States*, 346 U. S. 15 (1953), shows that this Court has not been as liberal as Judge Staley in its interpretation of the words "wrongful act". That was an action under the Federal Tort Claims Act by petitioners seeking damages from the United States for the death of one Henry G. Dalehite, which occurred in the explosion of FGAN at Texas City, Texas in April 1947, the incident commonly referred to as the Texas City Disaster. On pages 44 and 45 of the *Dalehite* opinion this Court rejected the contention that the language of the

Federal Tort Claims Act, including the words "wrongful act", embraced concepts of liability without fault or of absolute warranty. Mr. Justice Reed wrote as follows:

> "Though the findings of specific and general negligence do not support a judgment of government liability, there is yet to be disposed of some slight residue of theory of absolute liability without fault. This is reflected both in the District Court's finding that the FGAN constituted a nuisance and in the contention of petitioners here. We agree with the six judges of the Court of Appeals, 197 F. 2d 771, 776, 781, 786, that the Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an 'inherently dangerous commodity' or property, or of engaging in an 'extra-hazardous activity'. *United States* v. *Hull,* 195 F. 2d 64, 67."

It will be noted that this Court agreed that there are certain situations in which absolute liability is imposed irrespective of how the person liable conducts himself. These are instances where the liability creating quality of the act does not necessarily mean that the act was "wrongful". In this day and age liability can and does arise irrespective of wrong, and for that reason we submit that Judge Staley's reasoning (R. 585) is faulty.

A prime example of the fact that the liability creating aspects of an act or condition need not be predicated upon wrongfulness is the absolute warranty of seaworthiness. Reference once more to the key case of *Seas Shipping*

Co. Inc. v. *Sieracki*, 828 U. S. 35 (1946), shows that the concept of a warranty of seaworthiness by a shipowner was not predicated upon wrong on his part, but rather upon the hazards of the trade which, this Court felt, justified imposing a liability upon a shipowner on a "spread the costs" theory rather than on any theories of wrong. This Court wrote as follows at 328 U. S. 93:

> "That the liability may not be either so founded or so limited [to situations where an employer-employee relationship existed] would seem indicated by the stress the cases uniformly place upon its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. These, together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measureable in money, upon the owner regardless of his fault [citations]. Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.
>
> These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character."

The price which the shipping industry pays for engaging in what are termed to be "the hazards of maritime service" is that the shipping industry must bear the burden of absolute liability. That does not mean, of course, that to engage in shipowning is wrongful, only that it is hazardous.

Judge Staley has over-simplified his analysis of the words "wrongful act" when he states that anything which

produces liability must necessarily be wrongful. It should be obvious that our 20th century views on liability are not so restricted. Liability can and does arise every day without "wrong" in the sense that word was used by the Legislature of the State of New Jersey in 1846 when it enacted its counterpart of the British Load Campbell's Act.

Insofar as decisions emanating from the Courts of the State of New Jersey are concerned, no case has been found holding that the words "wrongful act, neglect or default", as used in the New Jersey Wrongful Death Act, include or were intended to include concepts of absolute liability or warranties of any sort, let alone a warranty of seaworthiness which would indicate that it was the intention of the legislature to create a double standard in the State of New Jersey—one standard for deaths occurring ashore and another standard for deaths occurring on waters of the State. To say that the legislature in 1848 intended one meaning to be applied as to land matters and another as to maritime matters is to embark on pure conjecture, wholly unsupported by authority.

The United States Court of Appeals for the Fifth Circuit has held that a State Wrongful Death Act using similar language did not give a cause of action for unseaworthiness. *Graham* v. *A. Lusi Ltd.*, 206 F. 2d 223 (5 C. A. 1953), was a suit brought by a widow of a longshoreman to recover under the Florida Wrongful Death Act (Title 43, Chap. 768, § 1; F. S. A. § 768.01). The longshoreman was killed when a defectively welded link in a chain supporting the weight of a ship's cargo boom parted and the boom fell striking him. The pertinent portion of the Florida Wrongful Death Act reads as follows:

> "Whenever the death of any person in this state shall be caused by the *wrongful act, negligence, carelessness or default* of any individual or individuals * * * (or by the wrongful act, negligence, careless-

> ness or default of any ship, vessel, boat or persons employed thereon), and the act, negligence, carelessness or default, *is such as would, if death had not ensued,* have entitled the party injured thereby to maintain an action, * * * then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued, shall be liable to an action for damages, etc." (Emphasis supplied.)

The libel asserted both the negligence of the owners of the vessel in providing unsafe equipment and the unseaworthiness of the vessel herself. The District Judge held that the words of the Florida Wrongful Death Act limited the causes of death to those occasioned by wrongful act or negligence, and that no cause of action was given for unseaworthiness. At the same time the District Judge conceded that had the plaintiff survived he could have maintained an action predicated upon unseaworthiness by virtue of the decision of this Court in *Seas Shipping Co.* v. *Sieracki, supra,* but since that cause of action under the federal maritime law did not survive his death, his widow was limited to a recovery based on negligence under the state wrongful death act. The United States Court of Appeals for the Fifth Circuit heard the appeal. The same claim was made, i.e., that unseaworthiness, being a cause of action which the deceased would have had if injured only, was therefore available to his representative in the action under the death act. Judge Borah rejected the argument at 206 F. 2d 225, writing as follows:

> "There is a complete absence of merit in appellant's attempt to avoid the foregoing defenses by invoking a right of action for unseaworthiness which, being a right of action the deceased might have maintained had he simply been injured and lived, is clearly not preserved by the legislative enactment under which appellant proceeds. Ake v. Birnbaum,

156 Fla. 735, 25 So. 2d 213, 221;[2] Epps v. Railway Express Agency, Fla., 40 So. 2d 131."

The United States Court of Appeals for the Sixth Circuit has also held that the words "wrongful act," will not support a cause of action predicated upon unseaworthiness. In *Lee* v. *Pure Oil Company*, 218 F. 2d 711 (6 C. A. 1955), the widow of a truck driver instituted suit to recover for his death when he fell from a barge into a river in Tennessee. The original complaint was based upon the Tennessee Death Statute (Title 20, § 607 of the Tennessee Code), and was predicated solely upon the alleged negligence of the barge owner. Upon the trial the plaintiff attempted to amend her complaint so as to allege a cause of action based upon the alleged unseaworthiness of the barge. The Trial Court refused to charge the jury as to unseaworthiness, and the case was accordingly submitted on the issue of negligence only. A verdict for the defendant resulted. The Tennessee Death Statute uses the key words "wrongful act, omission, or killing by another." The Court of Appeals for the Sixth Circuit affirmed the Trial Court's rejection of the requested unseaworthiness charge, stating at page 713 that the statute of Tennessee allowed "recovery only in the event of appellee's negligence."

" [2]The cited en banc decision of the Supreme Court of Florida holds in pertinent part that section 768.01 'gives a right of action to certain statutory beneficiaries for the recovery of damages suffered *by them by reason of the death* of the party killed; but it makes no provision for the recovery of the damages suffered *by the injured person by reason of the injury inflicted upon him.* Nor was the death by wrongful act statute ever intended to afford such remedy. It was not the purpose of the statute to preserve the right of action which the deceased had and might have maintained had he simply been injured and lived; but to create in the expressly enumerated beneficiaris an entirely new cause of action, in an entirely new right, for the recovery of damages suffered by *them*, not the decedent, as a consequence of the wrongful invasion of *their* legal right by the tort-feasor.' (Italics by the court.)"

We submit that there are no authorities which would justify an interpretation of the words "wrongful act, neglect or default" as used in the Wrongful Death Act of the State of New Jersey, to include unseaworthiness.

POINT IV

The Wrongful Death Act of New Jersey is not a survival statute.

As was pointed out in the opening paragraph of the Statement of this brief the libel in question sets forth four causes of action. The first two seek recovery under the New Jersey Wrongful Death Act, whereas the third and fourth causes of action seek to recover for damages accruing to the deceased in terms of conscious pain and suffering, medical expenses, etc. The latter two causes of action were presumably brought pursuant to the New Jersey Survival Statute (Rev. Stat. N. J. 2A:15-2; N. J. S. A. 2A:15-2).

In this respect the State of New Jersey conforms closely to the majority of the States, in that its legislature has enacted both a wrongful death statute and a survival statute. In one, an entirely new cause of action is given to the personal representative of the deceased to recover pecuniary damages which result to the designated beneficiaries by reason of the death. Under the survival statute, however, the damages recoverable by the estate of the deceased are limited to those damages which accrued to the deceased prior to his death. Assume, for example, the case of a person who is severely injured and dies from the injuries sustained after several weeks of hospitalization. Assume further that the widow of the deceased was the sole surviving next of kin. In such a situation the widow of the deceased, as his personal representative, would be entitled to recover under the New Jersey Wrong-

ful Death Act for the pecuniary loss resulting to *her* by reason of the death. That is, she would be entitled to receive money damages to compensate her for the fact that she could no longer expect contributions from the earnings of the deceased. On the other hand, the estate of the deceased would be entitled to recover under the survival statute, not the damages resulting from death, but rather the damages which accrued to the deceased before his death in terms of compensation for pain and suffering during the weeks in the hospital, together with the expenses of the hospitalization, doctor's fees and other items of damage to *him*. The two theories are, of course, entirely different.

Mr. Justice Brennan was sharply aware of the distinction between a survival statute and a wrongful death act in delivering the opinion of this Court in *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 430 (1958). In a footnote to the statement that the Jones Act remedy for wrongful death was exclusive as to members of the crew of the vessel, Mr. Justice Brennan wrote:

> "Presumably any claims, based on unseaworthiness, for damages accrued prior to the decedent's death would survive, at least if a pertinent state statute is effective to bring about a survival of the seaman's right. See *Holland* v. *Steag, Inc.*, 143 F. Supp. 203; cf. *Cox* v *Roth*, 348 U. S. 207; *Just* v. *Chambers*, 312 U. S. 383."

Mr. Justice Brennan apparently had in mind a situation such as was presented in *Curtis* v. *A. Garcia Y Cia.*, 241 F. 2d 30 (C. A. 3, 1957). Appeals 11,993 and 11,994 in that action concerned two claims by the administratrix of Thomas' estate based upon the Pennsylvania Wrongful Death Act and the Pennsylvania Survival Statute. As stated in the opinion of the United States Court of Appeals for the Third Circuit, the Courts of Pennsylvania had held that the Pennsylvania Wrongful Death Act did not

carry over causes of action which the deceased himself might have had. The ruling of the Pennsylvania Courts on this question is identical to those to be found in the Courts of the State of New Jersey. In the action under the Pennsylvania Wrongful Death Act the contributory negligence of the deceased was held to constitute a bar to recovery, but that very same degree of contributory negligence went only to mitigation of damages in the causes of action based upon the survival statute, since the survival statute preserved the deceased's rights to recover under the federal maritime law. In the *Curtis* case substantial damages had accrued to the deceased himself between the time of injury and the time of his death. As a result, his estate recovered a considerable amount of money under the survival statute portion of the claim, whereas nothing was recovered under the wrongful death act claim.

Libelant's proctor in the instant matter was fully justified in proceeding both under the New Jersey Survival Statute and the New Jersey Wrongful Death Act, but as it turned out, *no* damages were proven which might be recoverable under the New Jersey Survival Statute.

Perhaps as a result of disappointment over the failure to prove damages under the third and fourth causes of action, respondent has urged in the lower Courts that the New Jersey Wrongful Death Act was really a survival statute and that the deceased's causes of action were preserved to the respondent.

The Courts of New Jersey have held otherwise. As we understand it, respondent's argument is predicated upon the words "such as would" which are contained in the opening section of the New Jersey Wrongful Death Act. The argument appears to be that these words in some manner transform the wrongful death act into a parallel of the New Jersey survival statute.

In *Turon* v. *J. & L. Construction Company*, 8 N. J. 543, 556, 86 A. 2d 192 (1952), the Court wrote, in interpreting the New Jersey Wrongful Death Act:

> "This is not a mere survival statute. *It does not abolish the rule that a personal action dies with a person injured. The act creates new causes of action* for the loss suffered by the beneficiaries, measured by the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased. • • •
>
> "As said, *it is in no sense the enforcement of an action by survival.*" (Emphasis supplied.)

This interpretation was predicated upon that part of the Act defining the scope of the damages (N. J. S. A. 2A :31-5):

> "In every action brought under the provisions of this chapter the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries *resulting from such death* to the persons entitled to and to any intestate personal property of the decedent." (Emphasis supplied.)

The words "such as would" stem from the British Lord Campbell's Act (9 and 10 Vict. c. 93), from which Act the New Jersey Wrongful Death Act and most of the other wrongful death acts of our States have sprung. *Cooper* v. *Shore Electric Co.*, 63 N. J. L. 558, 563, 44 Atl. 630 (1899).

Similar interpretations have been made by the British Courts interpreting Lord Campbell's Act in *Blake* v. *Midland Railway Company*, 18 Q.B. 93, 110, 29 L.J.Q.B. 233, 16 Jur. 562 (1852) and in *Seward* v. *Vera Cruz*, 10 App. Cas. 59 (House of Lords, 1884), holding that the Act was entirely new in its nature and scope, as evidenced by the fact that the damages were not the damages which the deceased would have had, had he survived.

In the previous Point reference was made to the decision of the Fifth Circuit in *Graham* v. *A. Lusi Ltd.*, 206 F. 2d 223, 225 (5 C. A. 1953), involving a suit brougnt under the Florida Wrongful Death Act, where the claim was made that a recovery could be had for unseaworthiness. The Florida Death Act too contained "such as would" language, and yet Judge Borah rejected the argument that unseaworthiness, being a cause of action which the deceased would have had had he survived, was available to his representative in the action to recover for his death. Judge Borah's decision was predicated upon decisions of the State Court, which held that the Florida Wrongful Death Act was not a survival statute since the damages given were those "sustained by reason of the death of the party killed" and were not the damages which had accrued to the deceased himself.

The Tennessee death statute, which was involved in the decision in *Lee* v. *Pure Oil Company*, 218 F. 2d 711 (6 C. A. 1955), was also commented upon in the previous Point. The statute referred to the cause of action the deceased would "have had against the wrongdoer, if death had not ensued". The Court of Appeals for the Sixth Circuit held that a cause of action for unseaworthiness was not available to Lee's widow, since that cause of action was extinguished at the moment of death.

We submit that the language of the New Jersey Wrongful Death Act does not serve to give to the personal representative of the deceased rights under the federal maritime law, which rights, if any, necessarily must have terminated at the instant of death in accordance with prevailing law.

POINT V

The owners of the vessel did not warrant the seaworthiness of conditions in No. 3 shelter deck to the deceased.

Assuming for the moment that the respondent was entitled to recover, in general terms, under the federal maritime law, the facts show that the petitioners could not have warranted the seaworthiness of the No. 3 shelter deck to the deceased.

The previous Points in this brief have dealt primarily with questions of general law, whereas in discussing this Point it is necessary to refer to the factual record.

The decedent, as Maintenance Foreman for El Dorado Oil Works, met his death when he fell into the port deeptank of the vessel, which deeptank was located in No. 3 shelter deck. The deceased fell into the partially open tank "as he attempted to step on top of the tank" and "slipped on the spilled oil" (R. 573, 582). "His fall was caused by slipping when he had at least one foot already on the lid" (R. 575). At the time of his fall the deceased was approaching the electrical centrifugal pump, owned by El Dorado, which was standing on top of the tank lid. It was the failure of this pump which was the reason for the deceased's being on board at all (R. 573, 582). It was also the failure of this pump which had caused the tremendous oil spill in No. 3 shelter deck of the vessel (R. 582).

The allegedly unseaworthy conditions upon which the respondent might rely and which might be deemed to be proximately related to the death must be limited to the condition of the pump itself, or the oil spill in the No. 3 shelter deck resulting from the failure of the pump. In either case it would be ridiculous to state that the petitioners warranted the seaworthiness of the vessel with respect to either of these conditions to the deceased.

We are not urging that *no* part of m/v Tungus was warranted to the deceased as being seaworthy, but only that El Dorado's pump and the oil spill it created could not have been warranted to the deceased as being free of defects or potential dangers.

If the deceased had met his death in falling from a defective gangway while boarding the vessel or in falling through a rusted and defective deck plate, then an entirely different situation would be presented. Then it might be argued, at least, that the owners of the vessel warranted the seaworthiness of the gangway or of the deck plates, because the deceased was not summoned aboard the vessel to repair either the gangway or the deck plating and was not told that those portions of the vessel were in fact defective and unsafe.

On the other hand, the record makes it abundantly clear that the deceased *was* informed as to the trouble with the pump and did observe the working conditions in the No. 3 shelter deck before going down there to work on the pump (R. 156-8; 219-20; 484-7). The deceased was responsible for the operating condition of the pump and checked it before the arrival of the vessel at the El Dorado pier the previous afternoon (R. 453, 454).

It would be a contradiction of terms to state that a warranty of seaworthiness would be owed to the deceased as to the condition of the pump or the condition of the No. 3 shelter deck caused by the failure of that pump.

Our Courts have lent support to the argument that the warranty of seaworthiness must necessarily be limited in fact situations similar to the one presented. In *Byars* v. *Moore-McCormack Lines*, 155 F. 2d 587 (2 C. A. 1956), the plaintiff sustained injuries when falling through a defective hatch board of the vessel while engaged in setting up a beam across an opening in the ship's deck in connection with the construction of ammunition compartments. Plaintiff was an employee of East Coast Shipyards, an inde-

pendent contractor employed for the purpose of making certain repairs to hatch boards and also for building ammunition compartments aboard. The contract for the work specified among other repairs the renewal of 50% of the wooden hatch covers of the vessel. Before the work was done the independent contractor had the benefit of a survey of the defective hatches made by a port engineer. While aboard the vessel in connection with the construction of the ammunition compartment, the plaintiff fell through one of the defective hatch boards and was injured. In a *per curiam* decision it was held that there was no liability to the injured man under such a set of facts.

A similar situation was presented in *Bruszewski* v. *Isthmian S.S. Co.*, 163 F. 2d 720 (3 C. A. 1947), cert. den. 333 U. S. 828 (1948). While the vessel in question was being loaded in Philadelphia one of the ship's booms broke in two parts, with the larger section falling across the ship's winches. Arrangements were made with plaintiff's employer to have men furnished to remove the wreckage. Later in the day the plaintiff and 8 other longshoremen arrived at the pier in order to carry out this work. While the wreckage was being cleared, a loose block suspended in the rigging of the boom dropped upon the plaintiff. The plaintiff urged that he was entitled to recover under the traditional warranty of seaworthiness referred to in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946). In answering the question as to whether the doctrine of unseaworthiness included objects obviously unseaworthy the Court stated as follows at page 722 of 163 F. 2d:

> "We agree with the district judge that, although seaworthiness normally is a question of fact, Mahnich v. Southern S.S. Co., 1944, 321 U. S. 96, 98, 64 S. Ct. 455, 88 L. Ed. 561, it may be stated as a conclusion of law that no warranty of seaworthiness existed here. Logically construed, liability for an unseaworthy vessel should obtain only when the individual affected is entitled to rely, and does rely, upon the seaworthiness of something actually unsea-

> worthy. To state that a broken boom is warranted as seaworthy would require distortion of the meaning generally accorded those terms. 'The mere fact that a seaman has been ordered to do a dangerous thing does not establish a case of unseaworthiness. Chelentis v. Luckenbach S.S. Co. 1918, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171'. The Josephine & Mary, 1 Cir., 1941, 120 F. 2d 459 at page 464."

The Court then proceeded to distinguish *Seas Shipping Co.* v. *Sieracki, supra,* by pointing out that the plaintiff in that action suffered injury as the result of a defective appliance which appeared otherwise. In short, the Court held that the doctrine of unseaworthiness was not applicable where the presence of the injured man aboard the vessel was necessitated by and caused by the condition which proximately caused his injury.

This same point has been made in such cases as *Pinion* v. *Mississippi Shipping Co.*, 156 F. Supp. 652 (E. D. La., 1957), and *Filipek* v. *Moore-McCormack Lines,* 156 F. Supp. 854 (E. D. N. Y. 1957, now on appeal to the United States Court of Appeals for the Second Circuit). Also in *McDaniel* v. *M/S Lisholt,* 155 F. Supp. 614 (S. D. N. Y. 1957), aff'd — F. 2nd — (2 C. A. 1958).

As stated in the dissenting opinion of Circuit Judge Hastie (R. 594):

> "In these circumstances Judge Maris and Judge Kalodner would hold, relying upon *Bruszewski* v. *Isthmian SS Co.*, 3d Cir. 1947, 163 F. 2d 270, cert. denied 333 U. S. 828, that, even applying concepts of the maritime law, a shipowner does not warrant, to one so situated and informed as this workman, that the deck is free of oil or of the obvious hazards incidental to the presence of that substance. However, I am content to rest my dissent solely upon the construction and application of the New Jersey law, without examining the reach of the unseaworthiness doctrine, if maritime law were applicable."

Bearing in mind the fact that the deceased was fully aware of conditions in the No. 3 shelter deck, not only from having been informed about them over the telephone, but as a result of having been in the area itself for some 10 or 15 minutes (R. 158, 219-20, 484-6), we fail to see how it can be stated that the petitioners warranted conditions in the shelter deck to him, when the very reason for his presence aboard was that his pump had failed, and in failing had created the disastrous oil spill on which he eventually slipped and fell to his death. We fail to see how the defective pump or the oil spill created by that pump could have been warranted as seaworthy to one in the category of this deceased, who was necessarily familiar with pumps and their maintenance as well as with the characteristics of the vegetable oil products handled by his employer. The deceased was not an innocent passerby, but came aboard with full knowledge of the facts because the pump for whose proper operation he was responsible had failed and in failing had created the conditions now complained of.

POINT VI

The petitioners cannot be held liable to the respondent in terms of negligence under applicable decisions of the Courts of the State of New Jersey.

It has been urged by the respondent in the lower Courts that the shipowner would be liable for actionable negligence for not having provided the deceased with a safe place to work.

Upon the trial of the action the allegations as to negligence were directed towards claimed inadequate lighting in the shelter deck, the claim that the port deeptank should not have been partially opened, the claim that two steel hatch beams obstructed the passageway between the two tanks, and finally the claim that the members of the crew of the vessel should have cleaned up the oil spill in No. 3

shelter deck before the deceased was allowed to work on his pump. The first three grounds mentioned were effectively eliminated by the Trial Judge in his opinion (R. 574-5). They did not even warrant discussion by the majority or dissenting Judges of the United States Court of Appeals for the Third Circuit. There remains the question of alleged negligence in connection with not having cleaned up the oil spill.

The Trial Judge posed the question in the following terms (R. 575):

> "As to (4), the issue correctly is stated by respondent [petitioners]: Whether during the repair operations it was the vessel's duty to the deceased to clean up the oil spill".

In deciding that issue the Trial Judge stated (R. 576):

> "I am not persuaded that the owner of the vessel is under any duty to protect the workmen of the independent contractor, El Dorado Oil Works, engaged by the owners of the cargo of coconut oil, against the dangerous conditions created by the very work for which the independent contractor was hired. Accordingly, the court finds that the respondents are not liable for Skovgaard's unfortunate death and the libel must be dismissed."

During the course of his opinion, which constituted as well his findings of fact, the Trial Judge found that:

> "The entire repair operation was conducted by El Dorado, and there is no evidence from which to infer that any m/v Tungus personnel supervised or controlled either the discharge of the oil from the tank or the repair of the pump." (R. 576)

The majority opinion of the United States Court of Appeals for the Third Circuit did not set aside the above finding of fact as "clearly erroneous," which is the standard prescribed by Rule 52(a) of the Federal Rules of Civil Procedure.

In *McAllister* v. *United States*, 348 U. S. 19, 20 (1954), this Court held that no greater scope of review was exercised by the Courts of Appeal in admiralty cases than that prescribed by Rule 52(a) of the Federal Rules of Civil Procedure.

The majority of the United States Court of Appeals prefaced their discussion of negligence liability by stating (R. 587):

> "While it may be true that El Dorado supervised the pump repair operation, this would hardly lessen the duty of the vessel to provide a reasonably safe place to work, especially since El Dorado's supervision was not so complete as to exclude crew members from the area. In fact, it was the crew which first discovered the oil leakage and adopted temporary measures to stop it."

The majority bench below then proceeded to cite a number of cases, all of which were decided under the federal maritime law, since they involved cases of injury and not of death.

The three dissenting Judges of the United States Court of Appeals for the Third Circuit, in the opinion by Circuit Judge Hastie, took strong exception to the majority's position on the issue of negligence. Judge Hastie prefaced his discussion of the point in the following terms (R. 595):

> "This case has a second aspect. The libellant undertook to prove that, quite apart from unseaworthiness, the shipowner was responsible for actionable negligence on the part of the ship's personnel in not providing the decedent with a reasonably safe place to work. On the evidence and the findings we think the defendant was entitled to judgment on this branch of the case."

In discussing this aspect of the case it is necessary to refer to the transcript of the trial testimony to determine

the true degree of supervision and control exercised by the El Dorado pump crew and by the crew of the vessel over the discharge of the oil and the repair of the pump.

First of all, the electrical discharge pump, together with its accessories, including the suction and discharge lines, the source of electrical supply, and the air injection nipple whose fracture was the cause of the oil spill, all belonged to El Dorado. Ownership of the entire pump assembly and its accessories was admitted by El Dorado in answer to interrogatories 27, 28, 29 and 30 which were addressed to it by petitioners (R. 57-8, 62). The testimony of the various witnesses upon the trial did not vary on these points. Nor is it disputed that El Dorado and its employees were aboard m/v Tungus to discharge the contents of the port deep tank at the request of Pacific Vegetable Oil Company, the then owner of that shipment (R. 54-5, 60-1).

After m/v Tungus came alongside El Dorado's pier in Bayonne, New Jersey, the first thing to be done was to have the port deep tank opened in order to gain access to the oil. One officer and two members of the ship's crew assisted the El Doralo personnel in loading the discharging pump aboard the vessel (R. 299, 300). The function of these crew members was described by the Norwegian Chief Officer in the following terms (R. 299):

> "Well, during any discharge of any tank the ship, as a courtesy, always gives the company some of the crew members to help them, to be used for ship's equipment, to drive winches, and to hoist their equipment on board the ship."

The lifting and the placement of the tank lid was directed by El Dorado's employees. Mr. Blaney, the Plant Superintendent for El Dorado, testified that the complete discharging was under the direction of Patrick Sexton (R. 430).

The next order of business was to lift El Dorado's pump from the pier and lower it into the hatch and on top of the tank lid. With members of ship's crew driving the ship's winches this job was directed by El Dorado personnel as well. Mr. O'Leary, an El Dorado employee, who worked as a mechanic under the deceased, admitted that he was down in No. 3 shelter deck for the express purpose of arranging for a firm foundation for his pump (R. 461). He was completely satisfied with the way the pump had been placed before the suction and discharge hoses were brought aboard (R. 461). Mr. Blaney, the Plant Superintendent for El Dorado, admitted that the placement of the pump was determined by one of the employees of El Dorado (R. 239).

The ship's winches were then used to bring the suction and discharge hoses aboard the vessel for connecting to the pump, and, with the two members of the ship's crew driving the winches, the hoses were held by the winches and booms while the El Dorado personnel bolted the hoses into position (R. 461-2).

Judge Staley seems to make much of the fact that it was one of the members of the crew of m/v Tungus who "first discovered the oil leakage" (R. 587). We submit, however, that the discovery of the leak by the mate on watch most certainly did not indicate any degree of control by the officers or members of crew over the discharge. It will be recalled that when the burst in the pump was discovered by one of the officers making a routine tour of the decks, none of the El Dorado crew were in attendance, much less even aboard the vessel (R. 304; Exh. R-6, 560, 298). This absence from the vessel was contrary to the instructions of El Dorado, the employer of the pump crew (R. 57, 62). The Chief Officer testified under cross-examination that never before in his experience had he known members of a pump crew to leave their pump unattended during the course of discharging (R. 327).

Nor does the fact, as pointed out by Judge Staley (R. 587), that the personnel of m/v Tungus were aware of the existence of the oil spill spell out control or liability. It is difficult to conceive of how the officers of the vessel could have been unaware of the oil spill, when it was one of them who happened to discover the oil spill in the first place.

Judge Staley stated that the ship's crew adopted temporary measures to stop the oil leakage (R. 587). The fact of the matter is that none of the ship's crew even knew how to turn off El Dorado's pump. That is why it was necessary for an officer of the vessel to go ashore in order to find one of the El Dorado employees to have him turn off the pump, which in the meantime continued to pump hot liquid oil into No. 3 shelter deck until finally stopped (R. 188, 304). The pump was turned off eventually by one of El Dorado's men (R. 188, 304), and, according to the testimony of one of the El Dorado employees, members of the ship's crew drove a wooden peg into the fractured opening in the pump, not to stop the pumping operation, but to stop the backflow of oil in the discharge line and thereby reduce the extent of the spill (R. 188).

While the El Dorado pump crew were trying to repair the pump and restore it to operation, the Chief Officer of the vessel and Mr. Mallett (the cargo surveyor) went down into No. 3 shelter deck in order to examine the extent of the damage done by the spilled oil to general dry cargo which was stowed in the forward portion of the shelter deck and in the No. 3 hold, one deck below the shelter deck (R. 270-1, 304-5). As a result of that inspection the Chief Officer asked Mr. Sexton to sign a statement conceding liability for the damage done to the general cargo (R. 305), which Mr. Sexton refused to do (R. 508).

The Record is clear on the point that the employees of El Dorado maintained control over the repair of the pump and the clean-up operation in the interval between the

time the pump was turned off and the time the deceased fell into the open tank.

Mr. Russo, who was supposed to be in charge of the operation of the pump at the time the burst occurred, testified that the officers of the vessel had nothing to do with the servicing or care of the pump and had nothing to do with telling the El Dorado employees whether or not they should or could proceed with the pumping (R. 221). It is significant that under questioning by the Court Russo testified that the El Dorado employees had not asked the members of the ship's crew to clean up any oil in the No. 3 shelter deck after the pump had burst (R. 207). Quite the opposite, for the record is replete with testimony to the effect that the El Dorado employees, including Mr. Russo, had themselves cleaned up the oil spill in the working area around the pump by squeegeeing the oil off the tank top (R. 155, 176-7, 199, 444, 491-3, 495). Whereas Russo testified at first (R. 207) that he thought some of the ship's crew were cleaning up in the forward part of No. 3 shelter deck, where the general cargo was stowed, his later testimony made it quite clear that he had not seen them cleaning up at all, but that they were actually taking off the wooden hatch boards in order to see what damage had been done to the cargo in No. 3 hold by the liquid coconut oil (R. 210).

We argue strongly, against Judge Staley's conclusion that the presence of the officer in the hatch indicated that "El Dorado's supervision [of the pump repair operation] was not so complete as to exclude crew members from the area" (R. 587).

The fact that the El Dorado employees were in control of the pumping operation did not mean that the Chief Officer of the vessel or the cargo surveyor had to be excluded from the shelter deck, because the forward part of the shelter deck contained general cargo with which El Dorado was in no way concerned. The presence of the Chief

Officer and the surveyor in the forward part of No. 3 shelter deck conducting inspections of the damage done to other cargo in the hatch in no way diminished El Dorado's control over the pumping operation.

For Judge Staley to say that "it may be true that El Dorado supervised the pump repair operation" (R. 587), is to understate the true facts, because there is not one word of testimony anywhere in the record pointing to the fact that the officers or members of the crew of the vessel had *anything* to do with the repair of the pump.

As has been pointed out earlier in this brief the Chief Officer offered sand or sawdust to Mr. Sexton, the El Dorado man in charge. He also testified that sawdust had actually been given to Mr. Sexton for spreading in the No. 3 shelter deck after the oil spill and before the deceased fell into the tank (R. 309, 331). The offer, according to the Chief Officer, was rejected by Mr. Sexton, whereas Sexton himself denied that the offer had ever been made. The testimony on this issue was most significant, for under questioning by the Court the Chief Officer made it clear that he could do no more than suggest to Mr. Sexton that the sawdust be used, and that he was in no position to order Mr. Sexton to do anything at all, since Mr. Sexton was not one of his crew, and Sexton took orders only from his immediate superiors in El Dorado Oil Works (R. 347-8). It will be remembered that El Dorado was not engaged by petitioners.

Assuming for the moment that the testimony of the Chief Officer (as backed up by the contemporaneous log entry) was correct as to his offer of sand or sawdust, one might wonder why the offer was refused. Mr. Sexton's testimony on this point should be noted, because he testified that at the time the alleged offer was made he, Sexton, was of the opinion that neither sand nor sawdust were necessary, because his men had already squeegeed the

working area (R. 492, 493). Mr. Sexton agreed that the Chief Officer was in no position to tell him, Sexton, what should be done in the No. 3 shelter deck after the oil spill. The questions of counsel and the answers of Mr. Sexton were as follows (R. 493):

> "Q. Now, as receiving clerk in charge of receiving the oil, it would be up to you to say whether or not anything could be put on that oil so it wouldn't be left slippery, isn't that so? A. That is so, yes.
>
> Q. And after inspecting that area you gave no instructions to the men that were working there, is that correct? A. In my opinion, at that time, I thought that the area was clean enough. They [El Dorado employees] had squeegeed it."

Mr. Sexton conceded that he was in charge in the deep-tank area of No. 3 shelter deck, and that he was in a position to veto or overrule any suggestions or orders which might be given to him with respect to the operation of the pump, the discharge of the oil, or the contamination of the spilled oil. The word contamination is used advisedly, since it was the intention of the El Dorado personnel to salvage the spilled oil so as to insure receipt of as much of the oil as possible from the vessel. It is interesting to note that Donohue, one of the El Dorado pump crew, and Sexton both conceded that they had signed written statements within a couple of days of the accident in which they stated that it was their intention to salvage the spilled oil (R. 179-80, 480, 491). Naturally, if the oil had been contaminated with either sand or sawdust, such salvage would have been impossible.

Mr. O'Leary, an El Dorado employee, who arrived on board the vessel two hours after the accident, testified that when he observed the No. 3 shelter deck at that time ropes had been put around the tank opening and sawdust had been spread on the spill. Such testimony is wholly irrelevant to a determination of liability, but is significant in

deciding who was in control of the area at the time of the accident itself. After the accident, which occurred at 1:25 A. M. all the El Dorado employees on the ship walked off the job. O'Leary himself was the first to return (R. 470), and he did not return until 3:30 in the morning (Exh. R-6, R. 560, 297). The El Dorado crew did not even resume pumping until 6:20 A. M. (Exh. R-4, R. 554, 266; Exh. R-6, R. 560, 297). Any corrective measures which may have been taken by the ship's crew were taken only after the El Dorado employees had abandoned the vessel. From Mr. Sexton's testimony it is obvious that he would not have tolerated such measures had he still been aboard the vessel at the time.

We feel that these facts are important to point out the tremendous distinctions which exist between this case and the usual longshore injury case, where it is not unusual to find that the officers of the vessel were supervising the longshoremen and the discharge of the cargo, where the vessel engaged the longshoremen and was responsible to the shippers and/or consignees of the cargo for its safe discharge and where the vessel supplied the gear to effect that discharge. We have here a totally different situation—one in which the obligation to discharge and the obligation to provide equipment and personnel for the discharge were those of the consignee of the cargo, Pacific Vegetable Oil Company, which in turn hired El Dorado to carry out that obligation (R. 54-5, 60-1).

We submit that the Trial Judge was amply supported by the trial record when he stated (R. 576):

> "The entire repair operation was conducted by El Dorado, and there is no evidence from which to infer that any m/v Tungus personnel supervised and controlled either the discharge of the oil from the tank or the repair of the pump."

It is against such a background that we must determine "whether during the repair operations it was the

vessel's duty to the deceased to clean up the oil spill" (R. 575).

In support of his point that petitioners owed a duty to the deceased to provide him with a safe place to work with particular reference to the oil spill in No. 3 shelter deck, Judge Staley relied upon two cases—*Pope & Talbot Inc.* v. *Hawn*, 198 F. 2d 803 (C. A. 3, 1952), affirmed 346 U. S. 406 (1953), and *Feinman* v. *A. H. Bull Steamship Co.*, 216 F. 2d 393 (3 C. A. 1954).

Both these cases are clearly distinguishable on at least two grounds. First, both cases involved *injuries* occurring aboard vessels on navigable waters, and as a result the cases were decided under the federal maritime law and not under state law. Second, in both instances the failures to provide safe places to work and the resulting injuries had not the remotest connection with the particular work which was being done by the injured men.

Hawn was a ship's carpenter foreman who was aboard the vessel making certain minor adjustments to the grain feeders while the vessel was berthed in the Delaware River at Philadelphia. As he was moving about the hatch of the vessel giving instructions to his men he fell through an opening caused by the absence of one of the wooden hatch boards of the vessel. He sustained substantial injuries. The fact that the hatch board was not in place had nothing to do with the work being performed by the plaintiff and his men aboard the vessel. The plaintiff was not aboard to repair or replace wooden hatch boards. He was aboard for a totally different reason—to construct and make minor alterations in the grain feeders aboard the vessel.

Most important is the very clear statement of Mr. Justice Black, in delivering the opinion of this Court to the effect that Hawn's rights were to be determined under the federal maritime law and not under the laws of the

State of Pennsylvania. Mr. Justice Black wrote as follows at 346 U. S. 409:

> "(b) Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under national power to control in 'its substantive as well as its procedural features * * *,' *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 386. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling Acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. See *e.g.*, *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243-246, and cases there cited."

Feinman v. *A. H. Bull Steamship Co., supra,* concerned an injury to a marine electrician, employed by Sun Shipbuilding and Drydock Company, to recover for injuries sustained by him when he was struck by a falling hatch beam while working aboard a vessel owned and operated by A. H. Bull Steamship Company. The vessel was in navigable waters at the time. As such, there was no question but that Feinman's rights were defined by the federal maritime law rather than by the laws of the State of Pennsylvania. It is also obvious from the opinion that neither

Feinman nor his fellow employees had anything whatsoever to do with the condition of this hatch beam, and that they were entitled to rely upon the fact that it should have been securely locked in position while they were aboard.

The reliance of the majority below on these two cases is a further demonstration of the fact that they have ignored the negligence principles in effect in the Courts of the State of New Jersey, in a case where they have professed to concede that the Wrongful Death Act of the State of New Jersey provides the sole basis for a recovery by the respondent.

We submit that the decisions of the courts of the State of New Jersey are most instructive in determining "whether during the repair operations it was the vessel's duty to the deceased to clean up the oil spill" (R. 575). In *Broecker* v. *Armstrong Cork Co.*, 128 N. J. L. 3, 24 A. 2d 194 (1942), it was held that a danger which was obvious to a business visitor did not constitute a breach of duty to provide him with a safe place to work. An action was there brought to recover damages for the death of plaintiff's decedent, who had been killed as a result of a fall through a defective roof. The deceased was an employee of a roofing concern and was engaged in repairing and replacing the roof in question. A non-suit was granted by the Judge in the Supreme Court, which non-suit was subsequently affirmed by the Court of Errors and Appeals in a unanimous opinion delivered by Judge Case. Judge Case pointed out at 128 N. J. L. 4 that there was no proof in the record that defendant had exercised any authority over the contractor or its employees as to the methods which were to be followed or the precautions which were to be taken in the performance of the work. The Court held that the defendant was under no duty to provide the deceased with a safe place to work, and wrote at 128 N. J. L. 7 as follows:

"In our opinion the logic of the situation requires that there be a further exception in such a state of facts as exists when an independent contractor, or the employee of an independent contractor, comes upon lands, at the instance of the owner or occupier, to correct the precise condition which causes the injury. The restoration or repair of a rotted roof is not per se an act of negligence. That the rotted condition results in injury to the employee of an independent contractor who, without supervision or control by the owner or occupier, undertakes by his own methods and materials to do the job does not manifest negligence on the part of the contractee. As well might it be said that a contractor, employed to level the uneven condition of a sidewalk, may recover from his contractee for injuries which he receives in the course of his work by stumbling over the very obstacle which he is engaged to remove. It is said by the appellant that the deceased workman should have been provided with a scaffolding built under the roof so that he need not have walked upon the weakened board; but that was a problem for the contractor, who undertook to do the work. *Before recovery may be had a duty must exist in point of law and a failure in that duty must be proved in point of fact. It is hard to see how the person who engages an independent contractor is under any duty to guard the servants of the latter against the very danger that arises from their work.*" (Emphasis supplied.)

The reasoning is similar to that of the United States Courts of Appeals for the Second and Third Circuits, respectively, in the cases of *Byars* v. *Moore-McCormack Lines*, 155 F. 2d 587 (2 C. A. 1956), and *Bruszewski* v. *Isthmian S. S. Co.*, 163 F. 2d 720 (3 C. A. 1947), cert. den. 333 U. S. 828 (1948), both of which were discussed in the preceding Point.

As a matter of fact, the instant fact situation is even stronger than that presented in the *Broecker* case. The hole in the roof in that case was not created by the em-

ployees of the roofing concern, whereas the El Dorado Oil Works, through its employees, including the deceased, was most intimately at fault in the creation of the oil spill in the No. 3 shelter deck of m/v Tungus.

The instant fact situation is also stronger than that presented in the *Broecker* case in that this independent contractor, El Dorado Oil Works, was not engaged by petitioners. The owner of the cargo, Pacific Vegetable Oil Company, and not petitioners, were the ones who selected El Dorado and who ordered El Dorado to go aboard m/v Tungus to discharge the contents of the port deep tank. The petitioners did not even have a chance to select a competent contractor.

The testimony of Mr. Sexton makes it plain enough that he would have brooked no interference by the officers of the ship with the discharging of the oil or the repairs of the pump. The petitioners, not having hired the independent contractor to begin with, were in no position to enforce suggestions or orders given to the employees of that independent contractor.

Judge Staley tried to avoid the impact of the *Broecker* decision by stating that Skovgaard's death was not caused by the pump he was to repair, but rather by the oil spill. We respectfully submit that the distinction is so fine as to be meaningless. The breakdown of the pump and the spilling of the oil in the shelter deck are inseparable. The Record makes it abundantly clear that the petitioners had as little control over what was to be done with the spilled oil as they did over the operations and repairs of the pump. In going down into the shelter deck to repair the pump the deceased was fully aware of the conditions created by the failure of his pump. In line with the reasoning of the Court in the *Broecker* case, the oil spill was a danger which arose from Skovgaard's work as Maintenance Foreman for a vegetable oil storage and processing plant.

In *Mergel* v. *Colgate-Palmolive-Peet Co.*, 41 N. J. Super. 372, 125 A. 2d 292 (1956), the Superior Court cited with approval the foregoing language from the *Broecker* opinion, and added at page 379:

> "It has long been the law of the State that an employee assumes all those risks which are ordinarily incidental to his employment as well as those dangers which are plain and obvious to a person of ordinary understanding and judgment [citations]".

In the instant matter the record shows beyond question that the oil spill created by El Dorado's pump in the 'tween deck of m/v Tungus was apparent, obvious and known to the decedent. The record also shows that the deceased was responsible for checking the condition of the pump before the job was started. The failure of the pump and the resulting oil spill were the responsibilities of the deceased.

Under such conditions the Courts of New Jersey would deny recovery to this libelant. No different result should obtain because the forum was a federal court and not one of the courts of the State of New Jersey.

In further support of the stand taken by the Courts of the State of New Jersey on this point we refer to the decision of the Supreme Court of the State of New Jersey in *Lokar* v. *Church of the Sacred Heart*, 24 N. J. 549, 133 A. 2d 12 (1957). At page 553 the Court held:

> "The possessor of land is not liable to one rightfully on the premises for injuries attributable to dangers that are obvious or as well known to the user of the lands as to the possessor."

Again, we have the case of *Newbury* v. *American Stores Co.*, 115 N. J. L. 604, 180 Atl. 875 (1935), a decision of the Court of Errors and Appeals of the State of New Jersey referred to by Judge Hastie in his dissenting opinion in the instant matter. In ruling on the obligation of the owner

of premises to invitees for defective conditions of the premises the Court of Errors and Appeals wrote:

> "It is axiomatic that the rule that one who enters a store premises by invitation may lawfully assume that the proprietor has performed his duty to render the premises reasonably safe, is not applicable where the invitee knows the contrary to be the case."

The foregoing decisions should be binding in this case.

We submit that the Trial Judge was correct in stating that the owners of this vessel were under no duty to protect the deceased against the dangerous conditions which his fellow employees and his equipment had created during the course of the very work for which they were hired. Judge Staley and the other majority Judges below misconceived the nature of the operation and overlooked the obvious limitation of the authority of the Chief Officer over El Dorado's employees. They also applied federal admiralty concepts to define a state-created death claim.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be reversed and the libel dismissed.

Dated, New York, N. Y., September 4, 1958.

Respectfully submitted,

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DAVID P. H. WATSON,
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SUPREME COURT, U. S.

FILED

APR 24 1958

JOHN T. FEY, Clerk

United States Court of Appeals

October Term, 1957

No. 877

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

against

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

and against

EL DORADO OIL WORKS,

Respondent-Impleaded.

PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners,

against

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

and against

EL DORADO OIL WORKS,

Respondent-Impleaded.

PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Statement

The libellant-respondent's brief in opposition is noteworthy for its avoidance of the principal issues raised in the petition. Counsel for libellant-respondent would have us believe that the Wrongful Death Act of New Jersey,

N. J. S. A. 2A:31-1 *et seq.* is a survival statute which preserved to the libellant-respondent all the rights which the deceased would have had had he been injured only. Counsel thus tries to circumvent the accepted principle that neither the general maritime law nor the common law have ever provided recoveries for wrongful death.

Statement of Facts

The lengthy Statement of Facts supplied by counsel for libellant-respondent, once stripped of details and minutia irrelevant at this stage of the suit, does not alter the presentation of facts set forth in the petition. No amount of sifting of the extensive testimony in this suit can alter the fact that this deceased met his death aboard m/v Tungus as a result of slipping on an oil spill, which was in turn the result of a failure of his employer's pump, for the maintenance of which deceased was himself responsible. Nor can it be denied that the deceased had been summoned by his employer to come aboard m/v Tungus in order to repair the very pump which had caused the oil spill.

Summary of Argument

The majority opinion of the United States Court of Appeals for the Third Circuit states that the libellant-respondent can assert a right to recovery based upon the unseaworthiness of the vessel aboard which the deceased was killed under the Wrongful Death Act of New Jersey.

Such a right to recover for unseaworthiness would have to arise from one or all of three possible sources. It might arise directly from the federal maritime law, or directly from the New Jersey Wrongful Death Act or by survival of the rights which the deceased himself would have had if he had been injured only rather than killed.

As to the first, even counsel for libelant-respondent does not urge that the federal maritime law provides any right to recover in cases of death occurring, either on the high seas or in waters of a state. There is no question but that the federal maritime law, like the common law, makes no provision for death. That point was covered in the petition, and was conceded by the Court of Appeals majority.

As to the second possible source (that the right to recover for unseaworthiness stems from the New Jersey Wrongful Death Act), we pointed out in the petition that such an interpretation of the Act is wholly unsupported by the language of the statute, its legislative history or its interpretation by the Courts of the State of New Jersey.

Finally, since it is now urged that the libelant-respondent's right to recover for unseaworthiness stems from a survival of the rights her deceased husband would have had against the vessel if he had been injured only, we must refer to the decisions of the Courts of the State of New Jersey which hold that the New Jersey Wrongful Death Act is *not* a survival statute, but creates an entirely new cause of action. New Jersey has a separate survival statute, in which, however, damages are limited to conscious pain and suffering of the deceased, medical expenses in connection with his illness, if any, and similar matters, as to all of which there was no proof of damages in the instant suit.

The decision of the United States Court of Appeals for the Third Circuit cannot be justified under any of the foregoing theories.

ARGUMENT

The wrongful death act of New Jersey is not a survival statute.

Libelant-respondent argues in her brief that the Wrongful Death Act of New Jersey preserved to her causes of action under the general maritime law which her deceased husband would have had had he been injured only. In this manner she attempts to explain her right to recover for unseaworthiness, while having to admit at the same time that the general maritime law makes no provision for death.

As correctly stated on page 2 of her brief, libelant-respondent filed a libel stating four causes of action, two under the Wrongful Death Act of New Jersey, and two setting forth survival counts for pain and suffering of the deceased himself. The trial record, however, was bare of any testimony having to do with conscious pain and suffering or as to any time period between the fall and the moment of death. No damages were proven which might be recoverable under the provisions of the New Jersey Survival Statute (Revised Statutes of New Jersey 2A:15-2; N. J. S. A. 2A:15-2). Perhaps disappointed by the failure to prove damages under the survival counts, libelant-respondent now would have this Court believe that the Wrongful Death Act was a survival statute as well. The Courts of New Jersey have held otherwise.

In *Turon* v. *J. & L. Construction Company*, 8 N. J. 543, 556, 86 A. 2d 192 (Supreme Court New Jersey 1952), the Court wrote as follows in interpreting the New Jersey Wrongful Death Act:

> "This is not a mere survival statute. *It does not abolish the rule that a personal action dies with a person injured. The act creates new causes of action* for the loss suffered by the beneficiaries, measured by the reasonable expectation of pecuniary advan-

tage from the continuance of the life of the deceased. • • •

"As said, *it is in no sense the enforcement of an action by survival.*" (Emphasis supplied.)

The New Jersey Court gave no effect to the "such as would" language. This interpretation stemmed from that part of the Act defining the scope of the damages (N. J. S. A. 2A:31-5):

> "In every action brought under the provisions of this chapter the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries *resulting from such death* to the persons entitled to and to any intestate personal property of the decedent." (Emphasis supplied.)

Similar interpretations of the "such as would" language have been made by the British Courts (interpreting Lord Campbell's Act, where the phraseology originated) in *Blake* v. *Midland Railway Company*, 18 Q.B. 93, 110, 29 L.J.Q.B. 233, 16 Jur. 562 (1852) and in *Seward* v. *Vera Cruz*, 10 App. Cas. 59 (House of Lords, 1884). To the same effect are the interpretations of the Florida Wrongful Death Act by the Fifth Circuit in *Graham* v. *A. Lusi Ltd.*, 206 F. 2d 223 (C. A. 5, 1953) and of the Tennessee Death Statute by the Sixth Circuit in *Lee* v. *Pure Oil Company*, 218 F. 2d 711 (C. A. 6, 1955).

In a case involving death occurring in state waters the rights of the estate of the deceased under the state wrongful death act and under the state survival statute may be quite different. Such a distinction is to be found in *Curtis* v. *A. Garcia Y Cia.*, 241 F. 2d 30 (C. A. 3, 1957). Appeals 11,993 and 11,994 in that case concerned two claims by the administratrix of Thomas' estate based upon the Pennsylvania Wrongful Death Act and the Pennsylvania Survival Statute. As stated in the opinion, the Courts of Pennsylvania had held that the Pennsylvania Wrongful Death Act

did not carry over causes of action which the deceased might have had had he survived. The ruling of the Pennsylvania Courts on this question is identical to those to be found in the State of New Jersey. The *Curtis* decision is of prime interest because the contributory negligence of the deceased, Thomas, was held to be a bar to a recovery by his estate under the wrongful death statute, but his contributory negligence went only to mitigation of damages in the causes of action based on the survival statute, since the survival statute preserved the deceased's right of action under the federal maritime law. In denying recovery under the Wrongful Death Act the Court wrote as follows at 241 F. 2d 36;

> "The test is whether the right is one rooted in the general maritime law or one rooted in the state law. When the origin of the right has been determined, the court, federal or state, must apply the law of that jurisdiction in which that right originated. This plaintiff, in seeking recovery under the wrongful death statute, undertakes the enforcement of a right which is neither rooted in nor recognized by the maritime or the common law, but is wholly state created."

Libelant-respondent argues on page 18 of her brief that "an absurd situation would arise" if, in a case involving death in state waters, the cause of action under the State survival statute would be determined by federal maritime law, whereas the cause of action under the wrongful death act of that state would be governed by state law. To so argue is to say that the decision in *Curtis* v. *A. Garcia Y Cia., supra*, is absurd, for that is just what the Court held. We submit that that decision is sound and logical and whatever anomaly there may be stems from the irrefutable proposition that neither the common law nor the federal maritime law have ever provided recoveries for death.

A further example of the acceptance of the anomaly is to be found in *Byrd* v. *Napoleon Avenue Ferry Co.*, 125 F. Supp. 573 (E. D. La., 1954), affirmed on opinion below

227 F. 2d 958 (C. A. 5, 1955) cert. den. 351 U. S. 925, 76 S. Ct. 783, 100 L. Ed. 601 (1956). In that case the District Court held that the contributory negligence of the deceased husband, who was killed on the navigable waters of a state, barred a recovery for his death, whereas any contributory negligence of his wife, who was injured only, would have gone only to the mitigation of her damages.

An interesting comment on the *Burd* decision was made by Dean Roscoe Pound, Editor in Chief of the Law Journal published by the National Association of Claimant's Compensation Attorneys, at 15 NACCA L. J. 260, where he wrote:

> "In the instant case there is the anomaly that if the husband had lived his action would not have been barred by his contributory negligence, but, as he was killed, it was so barred. On the other hand, there would be a no less anomalous and a very inconvenient situation if the general maritime law as to negligence were applied to a suit in admiralty under the state Death Act. A different law in suits for wrongful death under the state act in the federal court to that applicable to the same suit in the state court would bring back into our law the bad condition from which we have been delivered as to suits in the diversity jurisdiction by Erie R. Co. v. Tompkins, 304 U. S. 84 (1938). But as in the instant case the only action for death of the husband was under the state law and under the state statute his contributory negligence barred his suit, the contributory negligence of the widow, if there had been any, would not bar her suit for personal injuries under the general maritime law. * * *.
>
> "Anomalies of this sort in a legal system are beyond the reach of judicial shaping of the law and the Legislature is not interested in them."

Judicial recognition of the anomaly is found in *Just* v. *Chambers*, 312 U. S. 668, 61 S. Ct. 687, 85 L. Ed. 903 (1941), in which it was held that Florida law could give a cause of action to an injured person against a deceased

shipowner even though the Federal law made no provision for such survivorship. Mr. Chief Justice Hughes wrote as follows at page 392:

> "For whatever lack of uniformity there may be in giving effect to the state rule as to survival is equally present when the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation. *Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved.*" (Emphasis supplied.)

Libelant-respondent's disappointment at not being able to prove damages on the survival counts of the libel, cannot justify interpreting the New Jersey Wrongful Death Act as a survival statute so as to give her a right to recover for unseaworthiness under the federal maritime law, which, being a right the deceased might have had had he survived, was not preserved to his widow by that legislation. There is no requirement under our law that rights in cases of death and injury must be identical or coextensive.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

OCT 22 1958

JOHN T. BROWNING, Clerk

Supreme Court of the United States

October Term, 1958

No. 43

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

against

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

and against

EL DORADO OIL WORKS,

Respondent-Impleaded.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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Libellant-Respondent,

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EL DORADO OIL WORKS,

Respondent-Impleaded.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF ON THE MERITS

Questions Presented

In their Petition for a Writ of Certiorari and in their Brief on the Merits the petitioners set forth questions which they contended were applicable to the instant case.. In

her brief on the merits the libelant-respondent has submitted a Counter Statement of Questions Presented which contains three different questions.

We submit that the third question of libelant-respondent has no place before this Court. In that third question libelant-respondent seeks to have this Court determine whether the contributory negligence of the deceased, if any, is to be determined under the comparative negligence rule of the general maritime law or under the rules of the State of New Jersey. Reference to the majority opinion below (R. 588) indicates that the United States Court of Appeals for the Third Circuit did not determine what defenses were available to the petitioners, feeling that it was not for them in the first instance to do so, since the question had been moot in the District Court. We respectfully suggest, therefore, that it would not be in order for this Court in the first instance to decide the factual and legal questions involved in determining whether the decedent was contributorily negligent or not and the effect of such contributory negligence, if any.

Statement of Facts

The lengthy counter-statement of fact supplied by counsel for libelant-respondent presents a one-sided version of the events occurring aboard m/v Tungus on December 5 and December 6, 1952. This counter-statement of facts also chooses to ignore the findings of fact contained in the opinion of the Trial Judge (R. 570), which is all the more surprising because the majority opinion of the Court of Appeals (R. 581) did not set aside those findings of fact. We particularly have in mind the Trial Judge's finding as to the repair operation and the discharge of the oil having been outside the supervision or control of the officers of the vessel (R. 576). As pointed out on pages 43 and 44 of petitioners' brief on the merits, the foregoing findings of

fact were not set aside by the United States Court of Appeals. Whereas the majority of the Court of Appeals disagreed with the legal conclusions resulting from those findings, the findings themselves were left untouched.

Perhaps some indication of the lack of candor contained in libelant-respondent's counter-statement of facts is the amazing discovery that although the counter-statement of facts covers ten pages, nowhere is it stated that the discharging pump in question together with all its accessory equipment, including suction and discharge lines, was owned by El Dorado. Nowhere is it stated that the pump was being operated by the fellow employees of the deceased. It is obvious that counsel for libelant-respondent, disliking the findings of fact made by the Trial Judge, chooses to ignore them, hoping that this Court would believe that petitioners' employees were in supervision and control of the discharge of the oil and were conducting the repairs to the pump as well. The fact is that both of the lower courts held that this was not so.

Summary of Argument

It seems obvious from his brief that counsel for libelant-respondent has forgotten the nature of the opinion written by Judge Staley on behalf of the majority bench of the United States Court of Appeals for the Third Circuit. That opinion very definitely left many questions unanswered on the grounds that they were to be determined in the first instance by the United States District Court upon a remand of the action, which remand was called for both in the opinion and in the judgment (R. 596). As we read it, Judge Staley's opinion held that the petitioners could be liable *if* the vessel were unseaworthy, and that they could be liable *if* it were found that they were negligent in failing to provide the deceased with a reasonably safe place to

work. The majority, however, specifically refrained from deciding whether m/v Tungus was unseaworthy, whether petitioners breached their duty to the deceased in terms of negligence, and also refrained from determining whether the deceased was contributorily negligent and if so what the effect of that contributory negligence would be. In other words, all the United States Court of Appeals for the Third Circuit did was to set forth a framework upon which and within which the issues of liability were to be determined by the District Court after remand. The reason the petitioners filed a petition to this Court was because they felt that the framework was erroneous, not because petitioners had been held liable either in terms of unseaworthiness or negligence.

The fact is that to date there has been no finding, either by the District Court or by the Court of Appeals, holding that m/v Tungus was unseaworthy. Nor has there been any finding that the petitioners breached any duty to the deceased in terms of negligence. The United States Court of Appeals for the Third Circuit held, and rightly so, that such matters were not for them to decide in the first instance (R. 588).

As we understand libelant-respondent's brief on the merits, her counsel would have this Court operate as a Court of initial jurisdiction and would have this Court make an initial finding as to unseaworthiness and negligence and as to the contributory negligence of the deceased.

We respectfully submit that counsel for libelant-respondent has mistaken the function of this Court. He has also misunderstood the majority opinion of the Court below. The only issue before this Court is whether the framework of law, as set forth in the majority opinion of Judge Staley, is correct or not. If it is correct, then the entire matter must be remanded to the District Court not only for a determination of the issues of unseaworthiness, negligence, and contributory negligence, but also for a

determination of the rights of the petitioners as against the respondent-impleaded under the impleading petition. If the majority opinion below is not correct, then the dismissal of the libel contained in the judgment of the District Court, must be affirmed, and the remaining questions would necessarily become moot.

In other respects libelant-respondent's brief is noteworthy for its avoidance of the principal issues raised in petitioners' brief on the merits. Counsel for libelant-respondent would have this Court believe that the Wrongful Death Act of New Jersey (Revised Statutes of New Jersey 2A:31-1 *et seq.*; N. J. S. A. 2A:31-1 *et seq.*), is a survival statute, which preserved to the libelant-respondent all the rights which the deceased would have had had he been injured only. And yet, counsel for libelant-respondent avoids any reference to the New Jersey Survival Statute (Revised Statutes of New Jersey 2A:15-2; N. J. S. A. 2A:15-2), and makes no reference to the argument contained on pages 33-37 of petitioners' brief on the merits where it was pointed out that the Wrongful Death Act and the Survival Statute are entirely different both as to the basis for liability and as to the resulting damages.

By these evasive tactics counsel for libelant-respondent attempts to circumvent the accepted principle that neither the general maritime law nor the common law have ever provided recoveries for wrongful death.

The majority opinion of the United States Court of Appeals for the Third Circuit states that the libelant-respondent can assert a right to recovery based upon the possible unseaworthiness of the vessel under the Wrongful Death Act of New Jersey.

Such a right to recover for unseaworthiness would have to arise from one or all of three possible sources. It might arise directly from the federal maritime law, or directly from the New Jersey Wrongful Death Act or by survival

of the rights which the deceased himself would have had if he had been injured only rather than killed.

As to the first, even counsel for libelant-respondent concedes that the federal maritime law provides no right to recover in cases of death occurring on waters of a state. There is no question but that the federal maritime law, like the common law, makes no provision for death. That point was conceded by the Court of Appeals majority.

As to the second possible source (that the right to recover for unseaworthiness stems from the New Jersey Wrongful Death Act), we pointed out in the Petition and petitioners' brief on the merits that such an interpretation of the Act is wholly unsupported by the language of the statute, its legislative history or its interpretation by the Courts of the State of New Jersey.

Finally, since it is now urged that the libelant-respondent's right to recover for unseaworthiness stems from a survival of the rights her deceased husband would have had against the vessel if he had been injured only, we refer to the decisions of the Courts of the State of New Jersey which hold that the New Jersey Wrongful Death Act is *not* a survival statute, but creates an entirely new cause of action. New Jersey has a separate survival statute, in which, however, damages are limited to conscious pain and suffering of the deceased, medical expenses in connection with his illness, if any, and similar matters, as to all of which there was no proof of damages in the instant suit. These cases were referred to in our Brief on the Merits at pages 33-37.

The decision of the United States Court of Appeals for the Third Circuit cannot be justified under any of the foregoing theories.

ARGUMENT

Libelant-Respondent Is Not Entitled to a Trial *De Novo* In This Court On Factual Issues.

Under Point IV running from page 46 to page 60 of libelant-respondent's brief counsel seeks to have this Court make initial findings as to the seaworthiness of the vessel and as to a breach of duty by the petitioners to the deceased. In so doing he pleads at page 46 that an admiralty appeal is a trial *de novo* and that this case is fully reviewable in this Court both as to facts and the law to be applied to those facts.

We submit that counsel for libelant-respondent has misconceived the scope of review in an admiralty case.

The proper scope of review in a case such as this has been defined by this Court in *McAllister* v. *United States*, 348 U. S. 19, 20 (1954), as follows:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure."

The pertinent portion of Rule 52(a) of the Federal Rules of Civil Procedure reads as follows:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * * "

The Rule does not state that *only* findings of fact based upon the credibility of witnesses will not be set aside unless clearly erroneous, but says that *no* findings of fact will be set aside unless clearly erroneous.

The Court below has recognized the demise of the concept of a trial *de novo*. In *Taylor* v. *Crain*, 224 F. 2d 237, 238 (3 C. A., 1955), Judge Goodrich wrote as follows:

> "Although briefs and arguments still repeat the phrase about an appeal in admiralty being a trial de novo, the Supreme Court has now stated categorically that we are to treat a finding in an admiralty case the same as one in a civil action governed by rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. *McAllister* v. *United States*, 1954, 348 U. S. 19, 75 S. Ct. 6."

Since counsel for libelant-respondent exhibits reliance in his brief upon the opinions of Dean Roscoe Pound, Editor in Chief of the NACCA Law Journal, we feel that perhaps the comment of Dean Pound on the case of *McAllister* v. *United States, supra,* as found at 15 NACCA Law Journal 277, would be of interest. Dean Pound wrote as follows:

> "It is gratifying to have our highest tribunal give up the hearing de novo by a court that has not seen or heard the witnesses and put all appeals on the same plane."

Other Circuits have agreed that the case of *McAllister* v. *United States, supra,* was the obituary to the old concept of a trial *de novo* in admiralty. In *Peterson* v. *United States*, 224 F. 2d 748 (9 C. A. 1955), Judge Orr wrote at page 749:

> "It is urged that we should determine the facts for ourselves under a theory of trial de novo. That theory has recently been laid to rest by the Supreme Court of the United States in the case of McAllister v. United States, 1954, 348 U. S. 19, 20, 75 S. Ct. 6, 8."

We submit, therefore, that since an appeal to a United States Court of Appeals in an admiralty suit is not a trial *de novo*, then most certainly the instant action cannot be deemed to be before this Court under any such theory.

The findings of fact of the Trial Judge, therefore, not having been set aside by the Court of Appeals as "clearly erroneous", are still valid and applicable, and the questions of law now before this Court are to be determined within the framework of those findings of fact, whether counsel for libelant-respondent likes them or not.

The Issue of the Contributory Negligence of the Deceased Is Not Presently Before This Court.

Point V of libelant-respondent's brief running from pages 61 through 68 is devoted to a discussion of the defense of contributory negligence both in terms of whether there was any and in terms of its effect. We submit that the issue of contributory negligence has never been passed on by either of the lower Courts.

In their answer to the libel petitioners urged as an affirmative defense the contributory negligence of the deceased (R. 26). That defense was never passed upon by the Trial Court, since its judgment dismissing the libel on the merits made a determination of the defense of contributory negligence unnecessary. Nor did the Court of Appeals pass on the issue. Judge Staley, writing for the majority, wrote as follows (R. 588):

> "While the New Jersey wrongful death statute adopts the maritime standard of care, it is silent as to available defenses. It is not for us in the first instance, however, but rather for the trier of fact, to determine whether the vessel's duty was breached and to decide factually what defenses, if any, might be available to the respondent. The question of the unseaworthiness of the vessel is likewise one which should be determined initially by the district court".

It will be noted that petitioners have not urged in their brief on the merits (as it is their intention to urge if the suit is remanded to the District Court) that the deceased

was contributorily negligent in causing his own death, and have not urged in their brief on the merits that any contributory negligence on the part of the deceased would serve as a bar to recovery in accordance with the prevailing rules in the Courts of the State of New Jersey. We can only suspect that proctor for libelant-respondent has included the Point on contributory negligence because the question is present in *Halecki* v. *United New York & New Jersey Sandy Hook Pilots Association,* 251 F. 2d 708 (2 C. A. 1958), now No. 56, October 1958 Term in this Court, and both the *Halecki* brief and the *Skovgaard* brief were written by counsel at approximately the same time.

Unseaworthiness Is Not a "Wrongful Act, Neglect or Default".

In their brief on the merits petitioners referred this Court to the authorities which pointed up the existing distinctions between concepts of negligence and warranties of seaworthiness. On pages 26 and 27 of his brief counsel for libelant-respondent attempts to convince this Court that unseaworthiness and negligence are one and the same thing in a seaman's action under the Jones Act (46 U. S. Code Sec. 688). The cases cited by him, however, are injury cases in which the injured seaman had a cause of action for negligence under the Jones Act and a second cause of action for unseaworthiness under the general maritime law. The same double remedy does not exist, however, when a seaman is killed rather than injured only. Our Courts have held that in a death case the representative of the deceased seaman is limited to a cause of action for negligence and is barred from proceeding for unseaworthiness under the general maritime law. In *Lindgren* v. *United States,* 281 U. S. 38, 47 (1930) this Court held that the Jones Act afforded the exclusive remedy for the death of a seaman and ruled out any recovery for unseaworthiness in the following terms:

> "Nor can the libel be sustained as one to recover indemnity for Barford's death under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. Aside from the fact that the libel does not allege the unseaworthiness of the vessel and is based upon negligence alone, an insuperable objection to this suggestion is that the prior maritime law, as hereinabove stated, gave no right to recover indemnity for the death of a seaman, although occasioned by unseaworthiness of the vessel."

It is quite apparent that this Court did not consider claims for negligence under the Jones Act and claims for unseaworthiness under the general maritime law to be one and the same thing.

To the same effect is the decision of the Court below in *Landy* v. *United States*, 101 F. Supp. 486 (E. D. Pa. 1951), affirmed 197 F. 2d 524 (3 C. A. 1952). This was a libel brought against the United States under the Suits in Admiralty Act (46 U. S. Code § 742) by the administrator of the estate of a deceased seaman to recover under the Jones Act. In discussing the claim on page 488 of 101 F. Supp., Circuit Judge Klodner stated in a footnote:

> "In addition to asserting that respondent was negligent in allowing this condition to exist, libellant also claims that this defect in the ladder rendered the vessel unseaworthy. The latter claim must be rejected without further consideration, since a cause of action for unseaworthiness, being an admiralty cause of action, does not survive the death of a deceased seaman. Robinson, Admiralty, p. 340. See also O'Neill v. Cunard White Star Ltd., D. C. 1946, 69 F. Supp. 943."

The United States Court of Appeals for the Third Circuit affirmed in a *per curiam* opinion reported at 197 F. 2d 524 (3 C. A. 1952), stating that they were in full accord with the conclusion of the District Court.

In other words, unseaworthiness and negligence are *not* the same thing.

In recognition of the weakness of his argument that unseaworthiness is a "wrongful act, neglect or default" counsel for libelant-respondent pleads for a broad liberal view of the problem and for a liberal construction of the statute. We submit that if ever a statute has been given broad liberal construction it is the Jones Act giving seamen causes of action against their employers. And yet, it will be noted, that despite all the liberality which has been exercised in favor of seamen, the basic distinction between negligence and unseaworthiness has never been breached. It is apparent from the authorities that if a seaman were injured only as a result of non-negligent unseaworthy condition he could recover, whereas if he were killed under the same circumstances recovery would be impossible. Perhaps this may be termed a harsh or unjust result, but it is a fact and a legal fact stemming directly from the rule that federal maritime law makes no provision for death. It is no more harsh or unjust to say that this deceased shore-worker might have sued for unseaworthiness had he survived, but since he died his representative has no such remedy available to her.

The Libelant-Respondent Is Not Entitled to Recover Under the Federal Maritime Law.

In his brief counsel for libelant-respondent skips blithely from the law of the State of New Jersey to the federal maritime law and back again as suits his purpose. After citing numerous authorities on pages 15, 16, 17 and 18 of his brief, counsel for libelant-respondent concedes that the general rule that the general maritime law does not provide for recovery for wrongful death is not overthrown and yet in the body of his brief one would never suspect that this was a wrongful death case, since nearly all the citations, authorities and references are to injury

cases, which were adjudicated under the general maritime law rather than under state law. It is obvious that counsel for libelant-respondent is enamoured of the general maritime law until the moment of death, and that from such moment on he will have none of it, since the general maritime law makes no provision for death. It would serve no useful purpose at this time to restate in detail the inapplicability of such cases as *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406 (1953); and other similar cases where the libelant or the plaintiff was suing to recover for injuries only under the general maritime law. The inapplicability of such cases has been commented upon already in petitioners' brief on the merits. Perhaps it is sufficient to refer to Mr. Justice Black's comment in *Pope & Talbot Inc.* v. *Hawn, supra*, when he stated at 346 U. S. 409:

> "His [Hawn's] right of recovery for unseaworthiness and negligence is rooted in federal maritime law".

Since it was so rooted that law took precedence over any state law which might have been urged by him. In the instant matter, however, we would remind this Court that the rights of the libelant-respondent are not "rooted in federal maritime law". If there were, the rights would be non-existent, because the federal maritime law has nothing but a void once death occurs. The authorities on that point are legion and need not be repeated at this stage. All the Judges below, the Trial Judge and the seven Judges of the United States Court of Appeals, agreed that the federal maritime law provided no remedy for wrongful death, and that the libelant-respondent was restricted to asserting a cause of action under New Jersey law. If only this basic principle is kept in mind it becomes apparent that the host of authorities referred to in libelant-respondent's brief must fall by the wayside.

The Petitioners Did Not Warrant the Seaworthiness of Conditions in No. 3 Shelter Deck to the Deceased.

Under Point V of our brief on the merits running from pages 38 through 42 we argued on behalf of the petitioners that it would be ridiculous to state that any warranty was made by the petitioners to the deceased either with respect to the pump itself or with respect to the oil spill created by the pump. In attempting to avoid the impact of the cases cited in that Point, counsel for libelant-respondent argues that the deceased was killed as a result of the oil spill and not as a result of the pump which he was engaged in repairing. We submit that the breakdown of the pump, which the deceased was engaged in repairing, and the spilling of the oil caused by the failure of that pump are inseparable. One followed the other just as naturally as night follows day. The question is not whether the deceased was hired to clean up the oil, but whether the petitioners warranted to the deceased that there was, in effect, no oil spill at all when he came aboard to repair the pump.

In *Broecker* v. *Armstrong Cork Co.*, 128 N. J. L. 3, 24 A. 2d 194 (1942) referred to in petitioners' brief on the merits, the New Jersey Court held that it was difficult to see how one who engaged an independent contractor was under any duty to guard the servants of that contractor against the very dangers that arose from their work. Under that reasoning no duty would be owed by these petitioners to the deceased with respect to the oil spill. The oil spill was a natural and logical consequence of the failure of the pump. The deceased, a maintenance man, came aboard to repair the pump, and there is no question but that the spilled oil was a danger, if danger it was, which he met every day in the course of his work for the oil company.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be reversed and the libel dismissed.

Dated, New York, N. Y., October 20, 1958.

Respectfully submitted,

J. WARD O'NEILL,
Counsel for Petitioners.

DAVID P. H. WATSON,
of Counsel.

SUPREME COURT, U. S.

APR 22 1958

JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. 43

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBS-AKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

—against—

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

—and against—

EL DORADO OIL WORKS,

Respondent-Impleaded.

BRIEF OF LIBELLANT-RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBS-AKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

—against—

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Libellant-Respondent,

—and against—

EL DORADO OIL WORKS,

Respondent-Impleaded.

BRIEF OF LIBELLANT-RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of Questions Presented

Whether a state may, in enacting a remedial statute permitting recovery for wrongful death, incorporate by reference the standard of liability under maritime law which existed for the benefit of the deceased if he had lived, where

such deceased was injured and died on the navigable waters of the United States and within the geographic jurisdiction of a state?

Whether a shipowner is under a duty to provide a safe place to work and a seaworthy vessel to a workman who comes on board for the specific purpose of repairing a pump used in discharging oil so that the work of discharging oil from the vessel could continue?

Statement of Facts

The petitioners, who were respondents below, seek issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit. That court heard the argument in this case twice, once by three members of the court and then *en banc*. The majority of the court reversed the judgment of the trial court dismissing the libel and remanded this case for further proceedings in conformity with its opinion.

The libel in this case states four causes of action. The first cause of action is based on unseaworthiness, the second is based on negligence. Both plead the Wrongful Death Act of New Jersey, N. J. S. A. 2A:31-1 *et seq.* (2a-7a). (References herein are to the appendix of libellant-appellant in the Court of Appeals.) The third and fourth causes of action are survival counts based on unseaworthiness and on negligence respectively, and were for the pain and suffering etc. of the deceased himself (8a-11a).

On December 6, 1952 at approximately 1:25 p. m., the m/v Tungus, respondents' vessel carrying a cargo of coconut oil, among other things, was tied up at Bayonne, New Jersey. The vessel had been docked at about 5:30 p. m. the prior afternoon and had been in the process of discharging some coconut oil from the port tank of the vessel (624a;

625a; Exh. R-6, 635a). El Dorado Oil Works, the respondent-impleaded and employer of the deceased, was receiving the oil from the vessel.

The Chief Officer of the vessel and the officer-on-watch were on duty (331a). In addition the Chief Officer had ordered two men to remain on board all night to help in discharging oil. These men were "to be used for ship's equipment, to drive winches, and to hoist their equipment on board the ship" (331a). These men were paid overtime by the vessel for remaining on duty (376a). The Captain of the vessel had remained on board the vessel that night (350a) as did other members of the crew (207a; 389a).

According to Mr. Wagner, an employee of El Dorado, called to testify by respondent-impleaded, he had received orders from the deceased to repair the pump to be used in unloading respondent's vessel and to check it on the morning of the day before the accident (506a). They checked it after Wagner finished, found it in good working order and it was then taken to the pier to await the arrival of respondents' vessel (507a). The deceased had nothing further to do with this pump until he boarded respondent's vessel about 1:25 a. m. the following day (513a).

The pump and hoses were taken on board at about 6:30 p. m. and they commenced to pump oil at about 8:05 p. m. (625a; Exh. R-6).

Mr. O'Leary, an El Dorado employee, was called by respondent-impleaded to testify. He was the one who had the job of getting the pump installed and started (509a). He stated that the ship's crew had taken off the tank cover with the ship's winches and were turning it to an angle across the tank top when he went on board to place the pump (510a). The Mate was giving signals to the persons

"who were manipulating the tank lid" (511a). O'Leary told the crew to place the pump "so that the suction side would be at the open hole" (511a). The ship's crew helped him by holding the hose while he bolted the hose in place (515a). The pump operated in a "satisfactory condition" until he was relieved at 8:30 or 8:40 p. m. by Mr. Sampson, another El Dorado employee (513a; 517a). Sampson was "standby on the pump" until 11:00 p. m. and he testified that the pump "was working good, very good" (530a; 531a).

The Chief Officer claimed that at about 9:00 p. m. he received a report from the Second Mate, who was on watch (335a). As a result he went over and looked down in the hatch. He saw no one attending the pump so he went to Mr. Sexton's office on the pier and told Mr. Sexton, the man in charge of shipping and receiving for El Dorado, that they should have a man standing by on the pump and that there was something wrong with the pump because it smoked (336a). Somebody came on board and took care of that (336a). This alleged incident was not recorded in the ship's log (625a, Exh. R-6).

Another incident was related by Mr. Mallet, a cargo surveyor, whose firm is still retained by Barber Lines, the agents for respondents in New York, who testified for respondents (43a; 65a; 286a; 303a). He had finished his duties at about 8:00 p. m. (295a). He remained on board the vessel that night as a matter of personal convenience (296a). At about 11:45 p. m. the Third Officer told him that there was some oil leaking from the pump. It wasn't much of a leak. When he came out again, later he observed that "oil was now spurting at a great rate" (297a; 298a). He stated that "there was oil on everything, all over the place" (306a). He stated that the smaller leak he first observed was the start of the larger leak that developed (311a).

At that point he stated "the Chief Officer and I went down below to the 'tween deck to inspect the cargo down there" (300a). According to Mr. Mallet's notes at 12:45 p. m. the leak was repaired and the El Dorado men were trying to start the pump again but they failed. He then left and went into the "officer's accommodations" (301a).

The fact that the pump was leaking came to the attention of the Chief Officer at 12:15 a. m. from the officer on watch (337a). The Chief Officer went on deck and he looked down and saw "oil was spurting out of the hold" (337a). The officer on watch went to get the El Dorado men. The Chief Officer went down in the hold "because a lot of oil had been thrown around by the leak, and cargo had been damaged" (337a). After the inspection he had an argument with Mr. Sexton about responsibility for the damage to the cargo on the vessel and he "told also to sweep the tank hold—tank covers, where the crew was working on." The Chief Officer also claims he offered sand and sawdust to Mr. Sexton "in order to minimize the danger of slipping in the oil" (338a). He stated that the leak had caused oil to be on the tank lids and on the shelter deck and oil "was all over the place" (384a). He stated that the reason he "suggested" to Mr. Sexton that he put sawdust on the oil was "in order to secure safety" (387a). However, he stated that he was not concerned with the safety of the El Dorado men who might have been working around there (366a).

Prior to the occurrence of the leak and at about 11:00 p. m. Mr. Sampson was relieved as standby on the pump by Mr. Russo, a maintenance mechanic's helper (530a). Russo was under the jurisdiction of Mr. Sexton, the El Dorado receiving foreman at that time (204a). He reported to Mr. Sexton for duty (243a). Mr. Sexton testified that Russo "was loaned from the Maintenance Department, which was due to a union deal that we had down there" (554a).

About 20 minutes after he got there, Russo testified that he went out to the pier for some rags and when he came back "one of the crew yelled that there was a break in the pump, a leak" (205a; 563a). Russo testified that he shut off the pump and the ship's crew, with a sledge hammer, put a peg into the nipple opening on the pump to stop the leak (205a-207a). This occurred according to Russo at about 11:25 or 11:30 p. m. (208a).

After the pump had been shut off and the oil stopped Russo went to the pier to inform Mr. Donohue, the assistant maintenance foreman (212a; 152). Donohue went on board with Russo and they surveyed the situation, obtained some more fittings and repaired the pump. Then they tried to "get suction" on the pump but couldn't (212a; 168a). While Russo and Donohue were working, there were officers and crew members on the same deck in the area (207a; 213a; 166a).

When Russo and Donohue started to work around the pump they "squeeged" some of the oil from the tank lid around the immediate working area, but they didn't clean the tank lid completely (167a; 218a; 496a; 497a). At this time Russo was not working under Donohue, who was assistant to the deceased in "supervising maintenance work," but was working as "standby on the pump" for Sexton (151a-153a; 204a; 496a).

When they couldn't get suction on the pump, Donohue talked to Sexton and they decided to call the deceased (168a; 538a).

The deceased, Carl E. Skovgaard, was employed by respondent-impleaded, El Dorado Oil Works, as a maintenance foreman about 2½ to 3 years before his death (135a; 271a).

On the night of the accident, the deceased was home with his wife having coffee and pizza pie when a call came from the plant (141a).

Mr. Sexton, a witness for respondent-impleaded, testified that he was the "shipping and receiving foreman" for El Dorado at the time of the accident (535a). He checked the temperature and the depth of the oil in the tank with the surveyor when the vessel came in (536a). He went on board again after they started pumping oil (537a). Later he received notice from either Russo or Donohue that there had been a break in the pumping operation (537a). He went on board again approximately at midnight (537a). Later when he returned from calling the deceased, he had a conversation with the Chief Officer of the ship (539a; 566a). They had a "heated discussion" about a statement for damaged materials which the Chief Officer wanted Sexton to sign (539a). Sexton denied that any conversation was had about the placing of sand and sawdust on the oil in the shelter deck (539a). During the time Sexton was talking to the Chief Officer, the deceased came on board (539a).

Mr. Mallet testified that the hatch coaming on the tank was stated to be 35 inches high (317a). After the accident he made measurements and found the oil 22 feet down from the tank coaming on one side and 21 feet 7¾ inches down on the other side giving the vessel a list of 2 degrees 6 minutes. The tank was about 30 feet deep (67a). The witness stated that the tank cover was 9 feet 8 inches long but he didn't measure its width (323a). Russo stated that the tank was about half open (202a). The temperature of the oil was 117° F. (624a, Exh. R-6). Russo and Donohue testified that there wasn't sufficient light provided by the vessel (174a; 234a).

There was testimony by Russo that when the crew had put a peg into the leaking hole immediately after the leak was discovered no more oil came out of the pump or the pump connections (208a). Russo estimated the time to be 11:25 or 11:30 p. m. (208a). It appears that coconut oil remained on the tank cover, the hatch beams and adjoining area for at least one hour before the accident to the deceased without any action being taken by the officers and crew of the vessel to reduce the hazard created by this oil near an open unguarded tank of hot oil where men had to work (219a). The respondents admit that no guards or ropes were placed around the tank opening (216a; 196a).

This was the situation which existed when the deceased came on board. The court below stated that at 1:25 a. m. the deceased boarded respondents' vessel. He went down to the shelter deck to assist Donohue and Russo. He moved from the foot of the ladder which led from the main deck. As he walked aft of the port tank he stepped on the hatch beams and while attempting to step on to the tank top, he "slipped on the spilled oil and fell to his death into 8 feet of hot oil" (638a).

Russo described the accident. He stated that he first noticed the deceased at the port side ladder while he and Donohue were trying to get suction on the pump after it had been repaired (215a). There was no oil aft of the port tank where the deceased had been standing (225a). From this position at the ladder the deceased had instructed them to start the pump and to shut it off. When they couldn't get suction he walked around to the starboard side. He "walked over casual like, the way he normally would" (217a). He "stepped up on a beam and commenced to come forward" (216a). He had one foot on the tank top and the other foot slipped and the deceased went into the open unguarded tank (218a; 248a). Nobody had given

the deceased any warning of any kind such as "Be careful, it is slippery around here" (217a).

Donohue also saw the deceased fall into the tank. He stated that the deceased slipped on oil from between the hatch beam and the hatch cover (171a). Sexton testified he looked down into the shelter deck after his argument with the Chief Officer. He observed the deceased in the after port corner of the shelter deck (540a). Then he observed the deceased walking around the after end of the port tank and he saw the deceased put one foot up on the beam between the tanks. When the deceased "attempted to put the other foot on the hatch cover" he slipped (541a).

Russo went down the ladder inside the tank and then Donohue went down, too. They climbed down a walkway in the tank and they looked for the deceased but didn't see him. Then a rope was dropped to them. They tied it to the ladder across the top of the oil. Russo grabbed hold of the rope and probed for the body in the oil with his feet. In the meantime a light was dropped. Finally they recovered the body of the deceased which was removed in a basket (172a; 235a; 489a-493). Sexton left the vessel and called an ambulance (541a). Sexton brought back a metal stretcher from his office with the Chief Officer of the vessel, but he stopped at the top of the gangway and did not go aboard the vessel (542a). The death certificate for the deceased states among other things that the cause of death was "suffocation and shock following submersion in oil" (612a, Exh. L-7).

The pump crew left the ship after the accident. A new pump gang came on board at 3:30 a. m. (626a, Exh. R-6). O'Leary, who was the first man to return, found that everything had been "sawdusted down" and ropes were being put up by the ship's crew (520a; 521a).

The Captain of the respondents' vessel had testified on deposition concerning the duties of the ship's officers. He stated that it was part of the duties of the Chief Officer on the vessel "to look after the cargo, upkeep of the ship, and to look after the crew; all the work as to the ship comes under him" (70a; 583a). It was the Chief Officer's duty to conduct inspections of the vessel while discharging operations are going on (71a; 584a). It was the duty of the officer on watch to be on the lookout for any defective conditions which might arise and with respect to any unsafe conditions it was his duty to correct them (72a; 75a; 584a).

The Chief Officer of the respondents' vessel testified concerning his duties. He stated that everything concerning the cargo is the Chief Officer's duty (351a). As Chief Officer, he inspected the vessel, while in port at least once an hour "going around the ship, looking in the hatches, and see that the cargo is discharged properly" (353a). He considered these inspections as part of his duty (353a). He stated that if he observed any unsafe condition which might cause injury to anybody aboard the vessel it was his duty to do something about it "as long as it is possible" (354a).

The ship's log had reported the events in part (625a):

"Saturday, December 6, 1952.

Pumping of oil from port tank continued past midnight.

At 0015 the oil connection burst where the steam pipeline is screwed on to same, becoming leaky. The leakage was detected by the ship's 3rd Officer who was on watch. The 3rd Officer tried immediately to call men from the pump crew, but it was found that none of the pump crew was on board. Before the 3rd Officer had succeeded in getting hold of the men which were

down on the dock the connection was broken off and the coconut oil gushed out into the starboard side of the shelter deck and down through the hatch covers in the forward part of the tank into the No. 3 lower hold. The pump was stopped immediately as the men came on board. The oil, however, continued to pass through the leaky place as the oil was running back through the oil hose. However, one succeeded in stopping the leakage by inserting a plug, but not before several tons of oil had run into the deck and lower hold.

* * * * *

At 0125 the foreman for the pump gang, Carl Skovgaard, who was engaged in inspecting the electric pump which was placed on the tank cover, which was laid across the tank trunk, fell down into the oil in the deep tank, which then was about 8′ above the bottom and 22′ from the top of the tank. The reason that he fell was that he slid in the oil which had been spilled across the tank cover on account of the leakage that had been caused. The ship's Chief Officer had called attention to that one had to scatter sawdust or sand on the tank cover before work was resumed.

His assistants immediately ran down the ladder into the deep tank in order to get hold of him. The ship's watchman and the First, Second and Third Officers immediately ran to get hold of gear, as a boat hook, and rope. Ambulance and doctor were sent for and stretcher and booms were made ready in order to get the victim ashore.

December 6, 1952 cont'd.

At 0135 they had found the lifeless body of the victim and brought him up on one of the longitudinal heavy girders in the tank. He was immediately put

on the stretcher and (home) ashore. He was landed on the dock at the same time as the ambulance and doctor arrived. The doctor could only pronounce him dead. After the accident the pump crew left the ship without emptying the pump or the hoses."

The opinion of the trial judge is reported in 141 F. Supp. 653 (D. C. N. J. 1956). The court did not consider the issue of unseaworthiness and did not make any fact findings on this issue. The court stated (642a):

"I am not persuaded that the owner of the vessel is under any duty to protect the workmen of the independent contractor, El Dorado Oil Works, engaged by the owners of the cargo of coconut oil, against the dangerous conditions created by the very work for which the independent contractor was hired. * * * "

The libel was dismissed and the impleading petition was dismissed (643a). Libelant appealed from dismissal of the libel (644a).

Holding that the trial judge's basic premise as to law was erroneous, Judge Staley stated (Pet. 17a):

"The duty of providing Skovgaard with a reasonably safe place to work, * * * would not be lessened even if there were a concurrent duty on the part of Skovgaard's employer. * * *

While the New Jersey wrongful death statute adopts the maritime standard of care, it is silent as to available defenses. It is not for us in the first instance, however, but rather for the trier of fact, to determine whether the vessel's duty was breached and to decide factually what defenses, if any, might be available to the respondent. The question of unseaworthiness of

the vessel is likewise one which should be determined initially by the district court."

The petitioner, before the factual determinations are made in the district court as directed, seeks review of this case by writ of certiorari.

POINT I

Two Courts of Appeal have interpreted the New Jersey Wrongful Death Act to apply the standards of maritime law in accidents which occurred on the navigable waters within the geographic jurisdiction of the State of New Jersey and there are no conflicting decisions on this interpretation of New Jersey law.

Two Courts of Appeal, in the Second Circuit and the Third Circuit respectively, which handle a large volume of maritime cases, after lengthy and thoughtful argument and consideration have agreed that the New Jersey Wrongful Death Act permits an action based on unseaworthiness and applies maritime principles of tort liability where the deceased, if he had lived, would have had a right to recovery on such principles of liability. *Skovgaard* v. *The M/V Tungus,* 252 F. 2d 14 (3 Cir. 1957); *Halecki* v. *United New York and New Jersey S. H. P. Ass'n,* 251 F. 2d 708 (2 Cir. 1958). This court in *Kernan* v. *American Dredging Co.,* —— U. S. ——, 78 S. Ct. 394, —— L. Ed. in footnote 4 of Mr. Justice Brennan's opinion referred to the opinion of the Court of Appeals in this case with apparent approval indicating in said footnote that the reasoning of the court in the *Skovgaard* case was consistent with the decisions of this court in determining the remedy available for death occurring on navigable waters, In addition, the decision of the Court of Appeals in this case is consistent with

and logically follows the decisions of this court in *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); *Levinson* v. *Deupree*, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953); *Just* v. *Chambers*, 312 U. S. 668, 61 S. Ct. 687, 85 L. Ed. 903 (1941); *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed 210 (1921); *Old Dominion S.S. Co.* v. *Gilmore*, 207 U. S. 398, 28 S. Ct. 133, 52 S. Ct. 264 (1907). Pursuant to these decisions it is clear that although maritime law does not give the next of kin of a deceased a right to recover under the maritime law itself, the maritime law will adopt and enforce a state wrongful death act to supplement the general maritime law.

The petitioners do not quarrel apparently with the construction of the New Jersey Wrongful Death Act which would permit recovery for negligence. This has been established for several years. *Gill* v. *United States*, 184 F. 2d 49 (2 Cir. 1950; *The H. S. Inc. No. 72*, 130 F. 2d 341 (3 Cir. 1942). On the other hand the libelant does not claim that the maritime law, by itself, gives a remedy to the next of kin for wrongful death. The issue in this case is not whether the maritime law permits recovery for wrongful death but whether the New Jersey Wrongful Death Act when adopted and enforced as part of maritime law will use the same test of liability as the deceased would have had if he had lived. The issue, as framed and decided by the majority in the Court of Appeals, involved *a construction of a state wrongful death act* rather than any alteration or departure from existing decisions of this court.

POINT II

The interpretation by the Court of Appeals of the New Jersey Wrongful Death Act is fully consistent with the plain language of the statute and the New Jersey decisions interpreting the statute.

The construction of the Court of Appeals in holding that the New Jersey Wrongful Death Act incorporated the same test of liability as would be applied if the deceased had lived was consistent with the plain language of the Statute and with the decisions of the New Jersey courts.

N. J. S. A. 2A:31-1 provides in part:

> "When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, * * *"

The courts of New Jersey have consistently held that the test of liability under the New Jersey Wrongful Death Act is the test of liability which would apply if the deceased had lived. In *Consolidated Traction Co.* v. *Hone*, 59 N. J. L. 275, 35 A. 899 (Supr. Ct. 1896), Chief Justice Beasley had stated in interpreting the New Jersey Wrongful Death Act at page 900 of Atlantic:

> "* * * From these extracts from the statute it will be at once perceived that in this suit, founded upon it, as in all others of the same class, but two questions are raised, and but two can be raised upon the record, viz: *First, could the deceased, if he had survived, have maintained an action?* And, second,

this being so, what pecuniary loss has fallen on his next of kin by reason of his death? * * *" (Italics ours.)

The above is quoted with approval in *Bastedo* v. *Frailey*, 109 N. J. L. 390, 162 A. 621 (E. & A. 1932). In view of the above, the Court of Appeals properly held that the test of liability, *i.e.*, the right to maintain an action was determined by the rights the deceased would have had if he had lived. See also *Coulter* v. *New Jersey Pulverizing Co.*, 11 N. J. Misc. 5, 163 A. 661 (Sup. Ct. 1932), where it was held that suit could not be brought for wrongful death where the Statute of Limitations had run before the death of the deceased, because "the statute only gives an action if the deceased had one." Not only is the nature and extent of the liability under the New Jersey Wrongful Death Act made co-extensive with the liability the deceased could have alleged if he lived, but the broad wording of the statute permits recovery for unseaworthiness as well as negligence.

Judge Staley, writing for the majority, stated (Pet. 15a):

> "We hold that failure to provide a seaworthy vessel in the case before us is such 'wrongful act, neglect or default' as will allow recovery under the New Jersey Wrongful Death statute."

Judge Learned Hand in the *Halecki* case held with reference to the New Jersey Statute and the warranty of seaworthiness (Pet. 35a):

> "* * * We hold that 'neglect' and 'default' both cover a breach of the warranty."

The conclusions of Judge Staley and Judge Learned Hand are amply supported. In *Judson* v. *Peoples Bank & Trust Company of Westfield*, 17 N. J. 67, 110 A. 2d

24 (1954), in constructing the meaning of the "wrongful act, neglect or default" of joint tortfeasors Mr. Justice Brennan held that the phrase included all torts of commission and omission. See also *Burns* v. *Bethlehem Steel Co.*, 20 N. J. 37, 118 A. 2d 544 (1955), where the words "wrongful act, neglect, or default" in a limitations statute were held to include a cause of action for personal injuries whether the action was based on tort or contract concepts.

In *Orez* v. *American President Lines, Ltd.*, 154 Fed. Supp. 241 (S. D. N. Y. 1957), the phrase "wrongful act, neglect, or default" as used in the New Jersey statute of limitations was held to include a claim based on unseaworthiness. The same phrase in the New York Wrongful Death statute has been held to include an action based on a warranty of fitness for use. *Greco* v. *Kresge*, 277 N. Y. 26, 12 N. E. 2d 557 (1938). The construction given to the New Jersey Wrongful Death Act by the Court of Appeals was reasonable and in full accord with the decisions of the courts of New Jersey interpreting the act. No New Jersey case directly or indirectly stands for the proposition which petitioner urges this court to adopt.

The construction given by the Court of Appeals is further buttressed by the fact that the New Jersey courts regard the New Jersey Wrongful Death Act "entirely and in the highest sense remedial in its nature." *Haggerty* v. *Central Railroad Co.*, 31 N. J. L. 349 (Supr. Ct. 1865). In construing it, "the rule is to avoid all subtle inventions and evasions for the continuance of the remedy" and "the duty of the court is to add force and life to the cure and remedy." *Murphy* v. *Board of Chosen Freeholders of Mercer County*, 57 N. J. L. 245, 31 A. 229 (Supr. Ct. 1894). See also *Hartman* v. *City of Brigantine*, 42 N. J. Super. 247, 126 A. 2d 224 (App. Div. 1956), aff'd 23 N. J. 530, 129 A. 2d 876 (1957). Aside from the rule of construction that

a remedial statute is to be liberally construed the court also must adopt a reasonable and fair construction in preference to a harsh or arbitrary one. If the construction of the Court of Appeals is rejected then an absurd situation would arise. Where a deceased died on a vessel in navigable waters of the United States and within the geographic area of a state his survival cause of action would be determined under maritime law, *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953), while the wrongful death action would be determined by analogous state law applied to situations on land. *Cf.* Comment of Judge Woodbury in *O'Leary* v. *United States Line Company*, 215 F. 2d 708 (1 Cir. 1954), cer. den. 348 U. S. 939, 75 S. Ct. 360, 99 L. Ed. 735 (1955). In the absence of any direct statement in the statute or any construction by the New Jersey courts that such an absurd situation was a desired purpose of the New Jersey Wrongful Death Act, the Court of Appeals properly gave the statute a fair and reasonable construction.

Obviously the purpose of the act is to incorporate the test of liability which would have existed if the deceased had lived. In this respect the next of kin are given neither greater or smaller rights than the deceased. In a case where the deceased died as a result of injuries received while a business invitee in a retail store, the law relating to the rights and duties of business invitees and storekeepers would apply. By the same logic where the deceased died as a result of injuries received on navigable waters within the boundaries of a state the law relating to the rights and duties of shipowners and those who come on board would apply. Since *Pope & Talbot, Inc.* v. *Hawn*, cited *supra*, the law applied would be the maritime law of the United States. It would be unreasonable to conclude that the legislature of New Jersey intended it otherwise particularly in view of the referral nature of the statutory language.

The New Jersey Wrongful Death Act does not have any language in it setting forth either contributory negligence or assumption of risk as defenses to an action brought under it. Judge Staley in the court below, writing for the majority, did not rule specifically on the issue of defenses available to the vessel on the ground that the factual determinations should be made first by the trier of facts on the remand of the case (Pet. 18a). Judge Learned Hand in the *Halecki* case held specifically (Pet. 37a):

> "* * * and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar."

It is not necessary in this case for this court to review this question because it has not been passed upon in the opinion of Judge Staley. If the trier of facts on the remand of this case finds that the deceased was not contributorily negligence and did not assume any risk then the legal issue raised as to such defenses is moot.

In any case Judge Hand's determination in the *Halecki* case is consonant with a reasonable interpretation of the New Jersey Wrongful Death Act. The test of liability is coextensive regardless of whether the deceased had lived and recovered for his personal injury or dies and his next of kin sue. It would require a finding of unreasonable logic on the part of the New Jersey legislature in passing a remedial statute to hold that a widow's claim could be barred by contributory negligence, however slight it may be, but that the deceased, if he had lived could have recovered. The legislature did not intend such a result. It did not specifically set forth such defenses. Instead it used a "referral test" for the very purpose of avoiding such an anomoly. See *The Devona*, 1 Fed. 2d 482 (D. C. Me. 1924).

POINT III

Under the maritime law and under New Jersey law the owner of a vessel is under a duty to provide a workman who comes on board a safe place to work.

Judge Staley, writing for the court below stated (Pet. 17a):

> " * * * It is relevant to note at this point that Skovgaard was called for the purpose of repairing the pump, not to clean up the oil spill. It is alleged that his death was caused by the condition of the deck and tank and not by the instrumentality he intended to repair. * * * "

In spite of this finding which is supported by the evidence, the petitioner still claims that working on an oily deck was a "risk" or "danger" arising from the employment of the deceased for which the vessel's officers, who had direct knowledge of the condition, were not responsible under New Jersey law. Since the test of liability is maritime law, the New Jersey decisions on this point are immaterial. Even if maritime law did not provide the test of liability, the New Jersey law does not help the petitioner. In the case of *Berquist* v. *Penterman*, 46 N. J. Super. 74, 134 A. 2d 20 (App. Div. 1957), cert. den. 25 N. J. 55, 134 A. 2d 832 (1957), Judge Goldman made the same distinction that Judge Staley did in this case. At page 25 of Atlantic, he stated:

> "The general rule is that an owner or occupier of premises who, by invitation, express or implied, induces a person to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for the purpose embraced in the in-

vitation. * * * Point Pleasant seeks to escape liability under that rule by arguing the applicability of the exception engrafted upon it by the court in Broecker v. Armstrong Cork Co., 128 N. J. L. 3, 7, 24 A. 2d 194 (E. & A. 1942); that an owner is not liable where an independent contractor or his employee comes upon lands by invitation 'to correct the precise condition which causes the injury.' * * * We do not consider the exception applicable to the instant case. Berquist's injury and eventual death did not stem from a dangerous condition he was called on to correct, or one which necessarily inhered in the work he was doing. * * * "

The holding that under maritime law the deceased, if he had lived, would have been entitled to a safe place to work and a seaworthy vessel is well supported. *Petterson* v. *Alaska S.S. Co.*, 347 U.S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954), *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946). His work was directly connected with the discharge of oil from the vessel.

CONCLUSION

The petition should be denied because

(a) The issues were fully and completely presented and argued in the court below and were correctly decided.

(b) The issue basically involves the interpretation of the New Jersey Wrongful Death Act and the interpretation of the court below is supported by the language of the statute and the decisions of the New Jersey courts to the extent they are applicable.

(c) The decision of the court below logically follows and is fully consistent with the decisions of this court

(d) The matter is not ready for final determination because there are additional factual issues to be resolved by the trier of the facts.

Dated: Hoboken, N. J.
April 18, 1958

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

OCT 6 1958

JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958

No. 43

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBS-AKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

—against—

OLGA SHOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

—and against—

EL DORADO OIL WORKS,

Respondent-Impleaded.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR LIBELLANT-RESPONDENT

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The petitioners owed the deceased the non-delegable duty to provide the deceased a seaworthy vessel and its failure to do so constituted a wrongful act, neglect or default such as would if death had not ensued, have entitled the person injured to maintain an action for damages 37

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(b) The petitioners' officers and crew remained in control of the vessel and they actively participated in the unloading operations 47

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(c) The petitioners' officers knew of the dangerous, hazardous and unseaworthy conditions which caused the death of the decedent and they negligently failed to remedy the situation or to otherwise provide the deceased with a safe place to work 50

(d) The deceased came on board petitioners' vessel to assist in repairing the pump and restoring it to operation but he had no duty to repair, remove or correct the dangerous and unseaworthy conditions which caused his death 56

(e) The deceased exercised due care for his own safety 59

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 43

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBS-AKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

—against—

OLGA SHOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

—and against—

EL DORADO OIL WORKS,

Respondent-Impleaded.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR LIBELLANT-RESPONDENT

Counter-Statement of Questions Presented

1. Whether a state, in enacting a Wrongful Death Act, may refer the standards of liability to the standards to be applied if the deceased had lived which, in the case of an accident on navigable waters of the United States, would be the general maritime law?

2. Whether the words "wrongful act, neglect or default" as used in the New Jersey Wrongful Death Act include an action based on unseaworthiness?

3. Whether the New Jersey Wrongful Death Act, which does not specify in the statute what defenses, if any, are available under its terms but uses a referral test for liability thereunder, incorporates the Maritime Law Rule of comparative negligence where such Rule would have been applied to an action by the deceased if he had lived?

Counter-Statement of Facts

This case involves an appeal in admiralty from a judgment dismissing a libel (R. 579), which judgment was reversed and the case remanded after an *en banc* decision of the United States Court of Appeals (R. 597).

The libel states four causes of action. The first cause of action is based on unseaworthiness, the second is based on negligence. Both plead the Wrongful Death Act of New Jersey, N. J. S. A. 2A:31-1 *et seq.* (R. 4-8). The third and fourth causes of action are survival counts based on unseaworthiness and on negligence respectively, and were for the pain and suffering etc. of the deceased himself (R. 8-11).

On December 6, 1952 at approximately 1:25 p.m. the m/v Tungus, petitioners' vessel carrying a cargo of coconut oil, among other things, was tied up at Bayonne, New Jersey. The vessel had been docked at about 5:30 p.m. the prior afternoon and had been in the process of discharging some coconut oil from the port tank of the vessel (R. 559; R. 560; Exh. R-6, R. 563). El Dorado Oil Works, the respondent-impleaded and employer of the deceased, was receiving the oil from the vessel.

The Chief Officer of the vessel and the officer-on-watch were on duty (R. 299). In addition the Chief Officer had

ordered two men to remain on board all night to help in discharging oil. These men were "to be used on ship's equipment, to drive winches, and to hoist their equipment on board the ship" (R. 299). These men were paid overtime by the vessel for remaining on duty (R. 338). The Captain of the vessel had remained on board the vessel that night (R. 316) as did other members of the crew (R. 190; R. 350).

According to Mr. Wagner, an employee of El Dorado, called to testify by respondent-impleaded, he had received orders from the deceased to repair the pump to be used in unloading petitioners' vessel and to check it on the morning of the day before the accident (R. 453). They checked it after Wagner finished, found it in good working order and it was then taken to the pier to await the arrival of respondents' vessel (R. 454). The deceased had nothing further to do with this pump until he boarded petitioners' vessel about 1:25 a.m. the following day (R. 460).

The pump and hoses were taken on board at about 6:30 p.m. and they commenced to pump oil at about 8:05 p.m. (R. 560, Exh. R-6).

Mr. O'Leary, an El Dorado employee, was called by respondent-impleaded to testify. He was the one who had the job of getting the pump installed and started (R. 456). He stated that the ship's crew had taken off the tank cover with the ship's winches and were turning it to an angle across the tank top when he went on board to place the pump (R. 457). The Mate was giving signals to the persons "who were manipulating the tank lid" (R. 457). O'Leary told the crew to place the pump "so that the suction side would be at the open hole" (R. 458). The ship's crew helped him by holding the hose while he bolted the hose in place (R. 462). The pump operated in a "satisfactory condition" until he was relieved at 8:30 or 8:40 p.m. by Mr. Sampson, another El Dorado employee (R. 459; R. 463). Sampson was

"standby on the pump" until 11:00 p.m. and he testified that the pump "was working good, very good" (R. 476).

The Chief Officer claimed that at about 9:00 p.m. he received a report from the Second Mate, who was on watch (R. 302). As a result he went over and looked down in the hatch. He saw no one attending the pump so he went to Mr. Sexton's office on the pier and told Mr. Sexton, the man in charge of shipping and receiving for El Dorado, that they should have a man standing by on the pump and that there was something wrong with the pump because it smoked (R. 303). Somebody came on board and took care of that (R. 303). This alleged incident was not recorded in the ship's log (R. 560, Exh. R-6).

Another incident was related by Mr. Mallet, a cargo surveyor, whose firm is still retained by Barber Lines, the agents for respondents in New York, who testified for respondents (R. 51; R. 70; R. 258; R. 273). He had finished his duties at about 8:00 p.m. (R. 266). He remained on board the vessel that night as a matter of personal convenience (R. 267). At about 11:45 p.m. the Third Officer told him that there was some oil leaking from the pump. It wasn't much of a leak. When he came out again, later he observed that "oil was now spurting at a great rate" (R. 268). He stated that "there was oil on everything, all over the place" (R. 276). He stated that the smaller leak he first observed was the start of the larger leak that developed (R. 280). At that point he stated "the Chief Officer and I went down below to the 'tween deck to inspect the cargo down there" (R. 270). According to Mr. Mallet's notes at 12:45 p.m. the leak was repaired and the El Dorado men were trying to start the pump again but they failed. He then left and went into the "officer's accommodations" (R. 271).

The fact that the pump was leaking came to the attention of the Chief Officer at 12:15 a.m. from the officer on watch

(R. 304). The Chief Officer went on deck and he looked down and saw "oil was spurting out of the hold" (R. 304). The officer on watch went to get the El Dorado men. The Chief Officer went down in the hold "because a lot of oil had been thrown around by the leak, and cargo had been damaged" (R. 304). After the inspection he had an argument with Mr. Sexton about responsibility for the damage to the cargo on the vessel and he "told also to sweep the tank hold —tank covers, where the crew was working on." The Chief Officer also claims he offered sand and sawdust to Mr. Sexton "in order to minimize the danger of slipping in the oil" (R. 305). He stated that the leak had caused oil to be on the tank lids and on the shelter deck and oil "was all over the place" (R. 346). He stated that the reason he "suggested" to Mr. Sexton that he put sawdust on the oil was "in order to secure safety" (R. 347). However, he stated that he was not concerned with the safety of the El Dorado men who might have been working around there (R. 329).

Prior to the occurrence of the leak and at about 11:00 p.m. Mr. Sampson was relieved as standby on the pump by Mr. Russo, a maintenance mechanic's helper (R. 476). Russo was under the jurisdiction of Mr. Sexton, the El Dorado receiving foreman at that time (R. 187). He reported to Mr. Sexton for duty (R. 220). Mr. Sexton testified that Russo "was loaned from the Maintenance Department, which was due to a union deal that we had down there" (R. 498).

About 20 minutes after he got there, Russo testified that he went out to the pier for some rags and when he came back "one of the crew yelled that there was a break in the pump, a leak" (R. 188; R. 505). Russo testified that he shut off the pump and the ship's crew, with a sledge hammer, put a peg into the nipple opening on the pump to stop the leak (R. 188-190). This occurred according to Russo at about 11:25 or 11:30 p.m. (R. 190).

After the pump had been shut off and the oil stopped Russo went to the pier to inform Mr. Donohue, the assistant maintenance foreman (R. 194; R. 143). Donohue went on board with Russo and they surveyed the situation, obtained some more fittings and repaired the pump. Then they tried to "get suction" on the pump but couldn't (R. 194; R. 157). While Russo and Donohue were working, there were officers and crew members on the same deck in the area (R. 190; R. 195; R. 155).

When Russo and Donohue started to work around the pump they "squeeged" some of the oil from the tank lid around the immediate working area, but they didn't clean the tank lid completely (R. 155; R. 199; R. 443; R. 444). At this time Russo was not working under Donohue, who was assistant to the deceased in "supervising maintenance work," but was working as "standby on the pump" for Sexton (R. 142; R. 143; R. 187; R. 444).

When they couldn't get suction on the pump, Donohue talked to Sexton and they decided to call the deceased (R. 156; R. 484).

The deceased, Carl E. Skovgaard, was employed by respondent-impleaded, El Dorado Oil Works, as a maintenance foreman about 2½ to 3 years before his death (R. 129; R. 246). Prior to the time he worked for his concern, he worked for Westinghouse in "the machine shop" and he worked for Sperry Gyroscope (R. 132). On the night of the accident, the deceased was home with his wife having coffee and pizza pie when a call came from the plant (R. 134).

Mr. Sexton, a witness for respondent-impleaded, testified that he was the "shipping and receiving foreman" for El Dorado at the time of the accident (R. 481). He checked the temperature and the depth of the oil in the tank with the surveyor when the vessel came in (R. 481). He went

on board again after they started pumping oil (R. 482). Later he received notice from either Russo or Donohue that there had been a break in the pumping operation (R. 482). He went on board again approximately at midnight (R. 482). Later when he returned from calling the deceased, he had a conversation with the Chief Officer of the ship (R. 484; R. 508). They had a "heated discussion" about a statement for damaged materials which the Chief Officer wanted Sexton to sign (R. 484). Sexton denied that any conversation was had about the placing of sand and sawdust on the oil in the shelter deck (R. 484). During the time Sexton was talking to the Chief Officer, the deceased came on board (R. 484).

Before proceeding with the narrative, we consider the situation which existed. The positioning of the tank top cover is shown in Exh. R-10 (R. 567). This picture was taken in 1955 when the scene was recreated by Mr. Mallet on behalf of petitioners (R. 274; R. 279). The hatch coaming on the tank was stated to be 35 inches high (R. 285). After the accident he made measurements and found the oil 22 feet down from the tank coaming on one side and 21 feet 7¾ inches down on the other side giving the vessel a list of 2 degrees 6 minutes (R. 291). The tank was about 30 feet deep (R. 72). The witness stated that the tank cover was 9 feet 8 inches long but he didn't measure its width (R. 292). Russo stated that the tank was about half open (R. 185). From the photograph it would appear that the unguarded tank opening at the time of the accident was at least 4 feet by 5 feet, and the depth of the hot oil was at least 8 feet (R. 567, Exh. R-10). The temperature of the oil was 117° F. (R. 559, Exh. R-6). Russo and Donohue testified that there wasn't sufficient light provided by the vessel (R. 161; R. 214).

Exhibit R-10 (R. 567) shows the location of beams between the two tank tops (R. 275). Mallet testified that these

beams were 9 inches high at the end and 12 inches at the middle (R. 285). This means that these iron beams laying between two tank coamings were not completely level. The vessel had placed the two iron hatch beams in the walkway between the two tank coamings. The wooden hatch covers were put "out of the way" in another spot by the crew. The iron beams were not removed from their location in the walkway between the two tank coamings even though the Chief Officer of the vessel knew that the El Dorado men were to work in that area (R. 326). Donohue stated that the beams took up most of the walkway between the hatch coamings (R. 150). The deck near the tank was made of steel (R. 151).

There was testimony by Russo that when the crew had put a peg into the leaking hole immediately after the leak was discovered no more oil came out of the pump or the pump connections (R. 190). Russo estimated the time to be 11:25 or 11:30 p.m. (R. 190). It appears that coconut oil remained on the tank cover, the hatch beams and adjoining area for at least one hour before the accident to the deceased without any action being taken by the officers and crew of the vessel to reduce the hazard created by this oil near an open unguarded tank of hot oil where men had to work (R. 200). The petitioners admit that no guards or ropes were placed around the tank opening (R. 198; R. 180).

This was the situation which existed when the deceased came on board. The court below stated that at 1:25 a.m. the deceased boarded respondents' vessel. He went down to the shelter deck to assist Donohue and Russo. He moved from the foot of the ladder which led from the main deck. As he walked aft of the port tank he stepped on the hatch beams and while attempting to step on to the tank top, he "slipped on the spilled oil and fell to his death into 8 feet of hot oil" (R. 573).

Russo described the accident. He stated that he first noticed the deceased at the port side ladder while he and Donohue were trying to get suction on the pump after it had been repaired (R. 196). There was no oil aft of the port tank where the deceased had been standing (R. 205). From this position at the ladder the deceased had instructed them to start the pump and to shut it off. When they couldn't get suction he walked around to the starboard side. He "walked over casual like, the way he normally would" (R. 198). He "stepped up on a beam and commenced to come forward" (R. 197). He had one foot on the tank top and the other foot slipped and the deceased went into the open unguarded tank (R. 198; R. 225). Nobody had given the deceased any warning of any kind such as "Be careful, it is slippery around here" (R. 198).

Donohue also saw the deceased fall into the tank. He stated that the deceased slipped on oil from between the hatch beam and the hatch cover (R. 159). Sexton testified he looked down into the shelter deck after his argument with the Chief Officer. He observed the deceased in the after port corner of the shelter deck (R. 485). Then he observed the deceased walking around the after end of the port tank and he saw the deceased put one foot up on the beam between the tanks. When the deceased "attempted to put the other foot on the hatch cover" he slipped (R. 486).

Russo went down the ladder inside the tank and then Donohue went down, too. They climbed down on a walkway in the tank and they looked for the deceased but didn't see him. Then a rope was dropped to them. They tied it to the ladder across the top of the oil. Russo grabbed hold of the rope and probed for the body in the oil with his feet. In the meanwhile a light was dropped. Finally they recovered the body of the deceased which was removed in a

basket (R. 160; R. 214; R. 438-441). Sexton left the vessel and called an ambulance (R. 487). Sexton brought back a metal stretcher from his office with the Chief Officer of the vessel, but he stopped at the top of the gangway and did not go aboard the vessel (R. 487). The death certificate for the deceased states among other things that the cause of death was "suffocation and shock following submersion in oil" (R. 133; R. 547, Exh. L-7).

The pump crew left the ship after the accident. A new pump gang came on board at 3:30 a.m. (R. 561, Exh. R-6). O'Leary, who was the first man to return, found that everything had been "sawdusted down" and ropes were being put up by the ship's crew (R. 466; R. 467).

The Captain of the petitioners' vessel had testified on deposition concerning the duties of the ship's officers. He stated that it was part of the duties of the Chief Officer on the vessel "to look after the cargo, upkeep of the ship, and to look after the crew; all the work as to the ship comes under him" (R. 74; R. 523). It was the Chief Officer's duty to conduct inspections of the vessel while discharging operations are going on (R. 75; R. 523). It was the duty of the officer on watch to be on the lookout for any defective conditions which might arise and with respect to any unsafe conditions, it was his duty to correct them (R. 76; R. 78; R. 524).

The Chief Officer of the petitioners' vessel testified concerning his duties. He stated that everything concerning the cargo is the Chief Officer's duty (R. 316). As Chief Officer, he inspected the vessel, while in port at least once an hour "going around the ship, looking in the hatches, and see that the cargo is discharged properly" (R. 317). He considered these inspections as part of his duty (R. 318). He stated that if he observed any unsafe condition which might cause injury to anybody aboard the vessel,

it was his duty to do something about it "as long as it is possible" (R. 318).

At the time of his death, the deceased was 43 years of age (R. 547, Exh. L-7). His widow, age 40, and three infant children, Christine, age 4, Carol, age 13, and Mary Elizabeth, age 16, survived him (R. 127; R. 128). He was in perfect health and his earnings exceeded $6,000.00 per year at his death (R. 129; R. 130; R. 485, Exh. L-4). He gave all of his earnings to the support of his wife and children with the exception of about $500.00 per year which he retained for himself (R. 131).

The opinion of the trial court is reported in 141 F. Supp. 653 (D. C. N. J. 1956). The court did not consider the issue of unseaworthiness and did not make any fact findings on this issue. The court found that there was no negligence on the part of petitioners' vessel in leaving the tank open, and in leaving the hatch beams between the tank coamings. The court found that there was sufficient light. As to the presence of oil on the tank lid, beams, and deck area near the tank, the court stated (R. 576):

> "I am not persuaded that the owner of the vessel is under any duty to protect the workmen of the independent contractor, El Dorado Oil Works, engaged by the owners of the cargo of coconut oil, against the dangerous conditions created by the very work for which the independent contractor was hired. * * *"

The libel was dismissed and the impleading petition was dismissed (R. 577). Libellant appealed to the United States Court of Appeals for the Third Circuit (R. 577). The respondents then appealed from the dismissal of the impleading petition (R. 579). The argument on appeal was heard first by three judges and subsequently was set down for rehearing before the Court en Banc (R. 581). The dismissal of the libel was reversed and the case was re-

manded (R. 597). Judge Staley, writing the majority opinion, stated that the trial judge had misconceived the nature of the wrongful death cause of action (R. 584). He interpreted the New Jersey Wrongful Death Act, stating that he words "wrongful act, neglect or default" as used in the statute permits recovery for unseaworthiness as well as negligence. With reference to the statement of the trial court, quoted above, Judge Staley stated (R. 587):

> "While it may be true that El Dorado supervised the pump repair operation, this would hardly lessen the duty of the vessel to provide a reasonably safe place to work, * * *. The personnel of the *Tungus* were well aware of the existence of the oil spill and the danger created by it.
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> * * *. It is relevant to note at this point that Skovgaard was called for the purpose of repairing the pump, not to clean up the oil spill. It is alleged that his death was caused by the condition of the deck and tank and not by the instrumentality he intended to repair. * * *"

This court has granted certiorari (R. 597).

Summary of Argument

The deceased, if he had lived, would have had his rights and duties with relation to petitioner's vessel, which was not on the high seas but was in the navigable waters of the United States, determined by the general maritime law. However, since his injuries resulted in his death an additional factor appears. The general maritime law, which has no positive rule denying recovery for wrongful death but merely has a void in the general body of maritime law on this question, in order to permit a remedy in this situation adopts and enforces a state wrongful death act where it would otherwise apply. Where, as in the case of the New Jersey Wrongful Death Act, it appears that the statute itself makes the test of liability the rights of the deceased if he had lived there is no conflict between the general maritime law and the state statute. The maritime law would determine the rights of the deceased if he had lived and hence the state statute incorporates the general maritime law by reference in this situation.

Only if it were concluded that the state statute, in spite of its referral language, required the application of state-law principles of analogous land situations does the possibility of conflict between state law and general maritime law arise. The New Jersey Wrongful Death Act does not present such a problem. If it did, the general maritime law would adopt only so much of it as is necessary to fill the void in the general maritime law and the rest would fall in the face of the positive rules of maritime law. The rule of comparative negligence is a positive rule of the maritime law.

The rule of comparative negligence would be applied in this case because the New Jersey Wrongful Death Act does not specifically list the defenses which would be avail-

able to a person sued under its provisions but uses language referring to the right of the deceased to maintain an action if he had lived. In addition, even if the New Jersey statute did provide specifically for the defense of contributory negligence of the deceased where an action was instituted by a non-negligent widow and children the general maritime law would apply its own positive rule of comparative negligence rather than the discredited common-law rule of contributory negligence.

In addition to the referral features of the statute, it uses the words "wrongful act, neglect, or default" which are broadly construed in accordance with the remedial intent of the legislature in enacting the statute. It therefore includes an action based on unseaworthiness as well as on negligence.

Since the deceased was doing work on equipment being used to discharge oil from a vessel, he was entitled to both a safe place to work and a seaworthy vessel. He was given neither.

The issue concerning the duty owed to one injured by a defective appliance or condition which he is employed to correct does not arise in this case. It is clear from the evidence that the injury and death of the deceased were caused by the condition of the deck in the area of the open tank of hot oil. It was not the duty of the deceased to remedy that situation. The petitioners admit that they had knowledge of that situation. They had an absolute and non-delegable duty to remedy it. They did not do so.

The trial court had misconceived the law to be applied in this case, and consequently no findings of facts were made on the pertinent issues. The facts in the record justify findings in favor of the libellant. The decision and judgment of the Court of Appeals should be affirmed.

POINT I

The New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1 et seq. will be adopted and applied to supplement the general maritime law and will permit recovery for both negligence and unseaworthiness where the injury and death occurred in navigable waters within the geographical limits of New Jersey.

(a) ***A Court of Admiralty applying the general maritime law will adopt and enforce a state wrongful death act to supplement the general maritime law where a maritime wrong occurs within the geographical limits of a state upon navigable waters.***

A Court of Admiralty will adopt a state wrongful death act to supplement the general maritime law. *Old Dominion SS Co.* v. *Gilmore,* 207 U. S. 398, 28 S. Ct. 133, 52 L. Ed. 264 (1907); *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210 (1921); *Just* v. *Chambers,* 312 U. S. 668, 61 S. Ct. 687, 85 L. Ed. 903 (1941); *Levinson* v. *Deupree,* 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953).

In the *Old Dominion SS Co.* case, *supra,* the appeal was from a decree allowing claims for a loss of life in a limitation proceeding. The accident happened on the high seas between two vessels owned by Delaware corporations. Certiorari was granted to review the question whether a Delaware Wrongful Death Statute applied to a claim for death on the high seas arising purely from tort in proceedings in admiralty. Mr. Justice Holmes speaking for the court answered in the affirmative. Among other things he stated at page 135 of the Supreme Court Reporter:

> "We pass to the other branch of the first question, 'whether the state law, being valid will be applied in the admiralty. Being valid, it created an obligatio,—a personal liability of the owner of the Hamilton to the claimants. * * *"

In 1920 Congress passed an act relating to actions for death on the high seas, 46 U. S. C. A. 761 *et seq.* The statute covers the specific situation in the *Old Dominion SS Co.* case, but does not affect the principle of law involved.

In the *Western Fuel Co.* case, *supra,* it was held that the limitations period of the California statute prevented an action from being filed in admiralty for wrongful death after the time prescribed by the California statute. However, in the course of his opinion Mr. Justice McReynolds stated at page 242:

> "As the logical result of prior decisions we think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. * * * "

In the *Just* v. *Chambers* case, *supra,* the court reviewed the question of the enforceability of claims for personal injuries against the estate of a deceased tortfeasor. In holding that such claims could be heard in admiralty, among other things, Mr. Chief Justice Hughes in the course of the court's opinion stated at page 388:

> "* * *. With respect to maritime torts we have held that the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation. * * *.
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> "This is illustrated, in the cases cited, by the effect given in admiralty to state legislation creating liability for wrongful death. The leading continental States of Europe, whose jurisprudence was developed from the civil law have given a remedy in such a case, but

a right of action was denied by the common law and likewise by the admiralty in England. And the Court, upon an elaborate review of the decisions, concluded that no suit for wrongful death would lie 'in the courts of the United States under the general maritime law.' * * *. The absence of a federal or state statute giving a right of action was emphasized. But when a state, acting within its province has created liability for wrongful death, the admiralty will enforce it."

In *Cox* v. *Roth*, 348 U. S. 207, 75 S. Ct. 242, 99 L. Ed. 260 (1955), the issue before the court was whether an action under the Jones Act survives the death of the tortfeasor. The difficulty which faced the court was that neither the Jones Act, 46 U. S. C. A. §688, nor the F. E. L. A., 45 U. S. C. A. §57, which it incorporates by reference, specifically provides for the survivorship of actions against deceased vessel owners. The court liberally construed these acts and found that such actions did survive on the basis of the "policy" of the act and the harshness of a contrary result. In addition Mr. Justice Clark, speaking for the court, commented at page 210:

"* * *. Since the decision here is confined to an interpretation of the Jones Act, there is no need to consider the 'slender basis' for the general admiralty rule against such survivorship of actions. See Just v. Chambers, 312 U. S. 383, 387, note 4, 61 S. Ct. 687, 691, 85 L. Ed. 903. Nevertheless, in considering the harshness of the rule sought to be imposed under the Jones Act, we do note that advancing civilization and social progress have brought 43 of our States to include in their general law the principle of the survival of causes of action against deceased tortfeasors, and that such recovery, rather than being exceptional, has now become the rule in almost every common-law jurisdiction. See the discussion of Roscoe Pound on death statutes as part of the general law, 13 NACCA L. J. 188-189 (May 1954)."

The *Cox* case, *supra*, while it involves the Jones Act, is significant because the last cited reference is a comment by Dean Pound on the case of *Graham* v. *Lusi*, 206 F. 2d 223 (5 Cir. 1953). This case held that the Florida Death by Wrongful Act Statute, *as interpreted by the Florida Supreme Court*, was not broad enough to cover an action based on unseaworthiness. Dean Pound apparently feels that it is time for the entire concept that wrongful death is non-remediable in a common-law or maritime action to be overhauled to meet current conditions. Among other things, Dean Pound stated at page 189:

> "* * *. Lord Campbell's Act is now well over a century old and has been adopted in every common-law jurisdiction. To think of recovery for wrongful causing of death as something exceptional not to be treated as part of the general law but to be provided for specifically as to application to every item of recent legislative improvement of the law is an anachronism. Today we should be thinking of the death statutes as part of the general law. * * *."

The Supreme Court cases discussed herein reveal that, while the general rule that the general maritime law does not provide for recovery for wrongful death is not overthrown, there has been developing a broad liberal view in adopting the wrongful death acts of states, where applicable, to supplement the general maritime law in this respect. It would seem that as a matter of construction, in view of this tendency toward a broad liberal construction, that a state wrongful death act should be construed to include maritime actions based on both negligence and unseaworthiness unless there is a clear legislative intent manifested in the act to discriminate against one or the other ground. The New Jersey Wrongful Death Act exhibits no such discriminatory tendency.

(b) *The Wrongful Death Act of the State of New Jersey, N. J. S. A. 2A:31-1 et seq., permits recovery for such "wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages* * * *"

It has been held that the maritime law will enforce a cause of action for death based on negligence applying the New Jersey Wrongful Death Act. *Gill* v. *United States*, 184 F. 2d 49 (2 Cir. 1950). The maritime law will enforce a cause of action for death based on unseaworthiness applying the New Jersey Wrongful Death Act.

This accident happened aboard a vessel docked at Bayonne, New Jersey (R. 69) and therefore the Wrongful Death Act of the State of New Jersey is applicable.

The action for death in the case at issue was based on two distinct grounds of recovery: (1) for negligence, and (2) for unseaworthiness.

N. J. S. A. 2A:31-1 sets forth the following test of liability:

> "When the death of a person is caused by a *wrongful act, neglect or default, such as would,* if death had not ensued, *have entitled the person injured to maintain an action for damages resulting from the injury,* the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages. * * *." (Italics ours.)

There are two key phrases in the part of the statute quoted above. The first is the phrase "wrongful act, neglect or default.". The other is the descriptive phrase "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages."

First we discuss the "such as" phrase which directly indicates that the "wrongful act, neglect or default" which it describes has the same scope as the "wrongful act, ne-

glect or default" which would give rise to an action by the deceased himself for personal injuries if he had lived. It is stated in relative terms and it avoids fixing the basis of liability as that existing at the time the statute was enacted. It permits the concepts of liability to develop with the rights of the individual. This is not the kind of statute that requires amendment with every new development in the substantive law of liability for personal injuries. It is rather an act designed to provide for dependents described in the act the same basis of liability as the individual has. It provides for neither more nor less. While the measure of damages may differ in the case of dependents, the basis of liability is coextensive in both wrongful death and personal liability cases. The "such as" clause establishes that the legislature did not intend it to be otherwise. Since the accident happened on navigable waters, the liability of the defendant to the deceased would be determined by the maritime law.

In an older case, *Consolidated Traction Co.* v. *Hone*, 59 N. J. L. 275, 35 A. 899 (Supr. Ct. 1896), Chief Justice Beasley had stated in interpreting the New Jersey Wrongful Death Act at page 900 of Atlantic:

> "• • • From these extracts from the statute it will be at once perceived that in this suit, founded upon it, as in all others of the same class, but two questions are raised, and but two can be raised upon the record, viz: *First, could the deceased, if he had survived, have maintained an action?* And, second, this being so, what pecuniary loss has fallen on his next of kin by reason of his death? • • • " (Italics ours.)

The above is quoted with approval in *Bastedo* v. *Frailey*, 109 N. J. L. 390, 162 A. 621 (D. & A. 1932).

In the case of *Paulmier* v. *The Erie R. R. Co.*, 34 N. J. L. 151 (Sup. Ct. 1870) Chief Justice Beasley had commented at page 157:

"* * * It seems to me that the literal language of the statute is to be followed, that is, a right of action exists in all cases in which such right would have existed in the party injured if death had not ensued, * * * "

The referral nature of the statute was recognized in the case of *Coulter* v. *New Jersey Pulverizing Co.*, 11 N. J. Misc. 5, 163 A. 661 (Supr. Ct. 1932). The plaintiffs had brought an action under the New Jersey Wrongful Death Act where the Statute of Limitation had barred the claim of the deceased before death. The action was dismissed on motion. After quoting the statute Justice Bodine stated at page 661:

"It is, of course, arguable that, since the actions are separate, the only bar to the action under the Death Act is the bar contained in the act itself. *But the statute only gives an action if the decedent had one.* In the present cases, the decedents' actions were lost by lapse of time. Since the decedents had no cause of action, their representatives had none. * * * " (Italics ours.)

It would be an unjust result and a harsh construction to interpret the statute with respect to some given basis of liability to say that the deceased, if he had lived and were totally disabled as a result of an injury, could receive (in addition to other elements of damage) his past and future loss of earnings; while if he died, his widow and infant children whose lives and happiness depend in large part on such earning power would be left remediless and in many cases penniless. It would thwart the obvious policy of the wrongful death act and certainly would not give the act the liberal construction intended.

In *Haggerty* v. *Central Railroad Co.*, 31 N. J. L. 349 (Supr. Ct. 1865), Chief Justice Beasly had stated in connection with the interpretation of this act at page 350:

"* * * The design of the act cannot be mistaken. It is entirely and in the highest sense remedial in its

nature. Its object was to abolish the harsh and technical rule of the common law-actio personalis moritur cum persona. The rule had nothing but prescriptive authority to support it; it was a defect in the law, and this statute was designed to remove that defect. It is, therefore, entitled to receive the liberal construction which appertains to remedial statutes."

The remedial nature of the statute was recognized again in *Murphy* v. *Board of Chosen Freeholders of Mercer County,* 57 N. J. L. 245, 31 A. 229 (Supr. Ct. 1894). It was claimed that the word "corporation" used in the New Jersey Wrongful Death Act was not broad enough to permit actions to be instituted under the act against public, municipal, or quasi municipal corporations. This argument was rejected by the court, Judge Lippincott stating at page 231 of Atlantic:

"* * * In the construction of a remedial statute, the rule is to avoid all subtle inventions and evasions for the continuance of the remedy, et pro privato commodo. The duty of the court is to add force and life to the cure and remedy, according to the true intent of the maker of the act, pro bono publico. * * *"

See also *Hartman* v. *City of Brigantine,* 42 N. J. Super. 247, 126 A. 2d 224 (App. Div. 1956), aff'd 23 N. J. 530, 129 A. 2d 876 (1957); *Turon* v. *J & L Const. Co.,* 8 N. J. 543, 86 A. 2d 192 (1952); *Cetofonte* v. *Camden Coke Co.,* 78 N. J. L. 662, 75 A. 913 (1910); *Carianni* v. *Schwenker,* 38 N. J. Super. 350, 118 A. 2d 847 (App. Div. 1955).

In this case, the deceased would have had two causes of action for personal injuries: (1) for negligence (2) for unseaworthiness. The intention of the legislature was in the event of his death, to give his dependents the same causes of action which he would have had, if death had not ensued. It follows that the legislative intent was to give to the dependents of the deceased both causes of action (1)

for negligence and (2) for unseaworthiness which he would have had if he lived.

Keeping in mind the remedial nature of the statute we now consider the meaning of the phrase "wrongful act, neglect or default." If the phrase were intended to be confined to acts of "negligence" the words "wrongful act" and "default" are unnecessary. In construing a statute, courts do not readily assume that words in a statute are superfluous. Both the words "wrongful act" and "default" in their natural meaning connote something much broader than mere negligence. Negligence in a legal sense is always a "wrongful act" and is sometimes the result of a "default." However not all "defaults" constitute negligence, nor do all wrongful acts fall within that classification. *Judson* v. *Peoples Bank & Trust Company of Westfield,* 17 N. J. 67, 110 A. 2d 24 (1954).

Judge Lombard, who dissented in the *Halecki* case has subsequently stated that unseaworthiness is included in the phrase "wrongful act, neglect, or default" as those words are used in the New Jersey statute law. The case involved a construction of the New Jersey statute of limitations which uses that phrase. In *Oroz* v. *American President Lines, Ltd.,* —— F. 2d —— (2 Cir. Decided Sept. 30, 1958), affirming 154 F. Supp. 241 (S. D. N. Y. 1957) he stated:

> "* * *. Only recently we held that the same language, 'wrongful act, neglect, or default,' as used in the state's wrongful death act, N. J. S. A. 2A:31-1, encompassed an action based upon unseaworthiness. *Halecki* v. *United New York & New Jersey Sandy Hook Pilots Association,* 251 F. 2d 708 (2 Cir. 1958), cert. granted June 9, 1958. See also *Skovgaard* v. *The Tungus,* 252 F. 2d 14 (3 Cir. 1957), cert. granted June 9, 1958. Further, this Court has suggested that breach of the implied warranty of seaworthiness is a tort, *Strika* v. *Netherlands Ministry of Traffic,* 185 F. 2d 555, 558 (2 Cir. 1950), cert. den. 341 U. S. 904.

In any event, the construction of the New Jersey statutes by the New Jersey courts is determinative, and they have uniformly held that the two-year provision applies to all personal injury claims, whether based upon tort or contract. *Burns* v. *Bethlehem Steel Co.*, 20 N. J. 37, 118 A. 2d 544 (1955); *Weinstein* v. *Blanchard*, 109 N. J. L. 332, 162 Atl. 601 (Err. & App. 1932). See *Martucci* v. *Koppers Co.*, 58 F. Supp. 707 (N J. 1945)."

The phrase "wrongful act, neglect or default" has been construed to include an action based on a breach of warranty of fitness for use under the New York statute. In *Greco* v. *Kresge*, 277 N. Y. 26, 12 N. E. 2d 557 (1938) the plaintiff's wife died as a result of eating infected pork frankfurters purchased from the defendant. The plaintiff's cause of action for negligence was dismissed by consent. The motion to dismiss the cause of action based on a breach of warranty was denied. Justice Rippey speaking for the New York Court of Appeals posed the issue at page 31:

"* * * The inquiry here is whether the breach of the implied warranty as alleged in the complaint, negligence being disclaimed, was a 'wrongful act, neglect or default' within the meaning of the statute. * * *"

After considerable discussion of the history and nature of the wrongful death acts, he stated at page 34:

"* * * At times the same facts may warrant procedure ex contractu or ex delicto. At such times recovery is not conditioned on definition nor measured by a determination of whether it is grounded in a violation of a duty owing to another or in a breach of a contractual obligation. * * * Violation of a duty owing to another is a wrongful act; breach of a contract involving violation of duty may be likewise a wrongful act. Here the duty rested on defendant to see, at its peril, that the food was fit for human consumption and it is based on considerations of public health and public

policy. * * * Though the action may be brought solely for the breach of the implied warranty, the breach is a wrongful act, a default and, in its essential nature, a tort. * * *

"We conclude that the breach of the warranty in a case such as this was a 'default' or 'wrongful act' within the meaning of those terms as used in the statute not only as a matter of definition but within the clear legislative intent. * * *

" * * * Apropos are the words of Judge Cardozo in the closing paragraph of his opinion in Van Beeck v. Sabine Towing Co. * * * where he refers to the construction to be given death statutes. 'Death statutes,' he writes, have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow of grudging process of construction were to exemplify and perpetuate the very evils to be remedied. * * * There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source or law, a new generative impulse transmitted to the legal system. * * * "

Cf. also *Sullivan* v. *Dunham,* 161 N. Y. 290, 55 N. E. 923 (1900); *Greenwood* v. *John R. Thompson,* 213 Ill. App. 371 (1919); *Roche* v. *St. John's Riverside Hospital,* 96 Misc. 289, 160 N. Y. S. 401 (1916) aff'd 161 N. Y. S. 1143 (App. Div. 1916); *Grein* v. *Imperial Airways Ltd.,* 1 K. B. 50; (1936) 2 All. E. R. 1258, C. A.; *Jackson* v. *Watson & Sons,* 2 K. B. 193 (1909); *The H. S. Inc. No. 72,* 130 F. 2d 341 (3 Cir. 1942).

There is every reason in logic and in justice to consider unseaworthiness a maritime tort which is a "wrongful act, neglect or default." In *Seas Shipping Co.* v. *Sieracki,* 149 F. 2d 98 (3 Cir. 1945) Judge Goodrich after pointing out that so far as "warranty" depended on contract, a stevedore was not a party to a contract, he concluded at page 101:

"• • • And so an injury to a stevedore comes within the classification of a marine tort. • • • "

The United States Supreme Court in the same case in 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), Mr. Justice Rutledge speaking, stated at page 877:

"• • • It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. • • • Carlisle Packing Co. v. Sandanger, supra, it is a form of absolute duty owing to all within the range of its humanitarian policy."

A seaman's remedy for unseaworthiness and his remedy for negligence are considered two aspects of a single cause of action. *McAllister* v. *Magnolia Petroleum Company*, —— U. S. ——, 78 S. Ct. 1201, —— L. Ed. —— (1958). In the case of *Troupe* v. *Chicago D. & G. Bay Transit Co.*, 234 F. 2d 253 (2 Cir. 1956), Judge Waterman considered the various theories on which a federal court, sitting on the civil side, could have jurisdiction of an action based on unseaworthiness where an action for negligence under the Jones Act is also pleaded. In considering "pendent jurisdiction" as a ground he reviewed the nature of the two theories of recovery. He stated at page 258:

"• • • The Jones Act claim for negligence and the maritime claim for unseaworthiness provide seamen with two different grounds of relief for the commission of the same wrong. A judgment on one claim bars a second suit based on the other claim. • • • Since both claims are based on the same operative facts, they constitute a single 'cause of action.' • • • Because of the *extremely close relation* of the two claims, and the virtual identity of their factual components, it is arguable that a federal district court, having properly taken jurisdiction at law under the Jones Act over the negli-

gence claim, has jurisdiction at law over the closely related unseaworthiness claim. * * * "

In view of the "close relation" of causes of action based on negligence and unseaworthiness it is difficult to conceive why the broad "wrongful act, neglect or default" classification does not apply to both. See also the comment of Judge Learned Hand in *Gill* v. *United States*, 184 F. 2d 49, 57 (2 Cir. 1950).

Unseaworthiness falls within the broad classifications of "wrongful acts" or "defaults" if not "neglects." There is no reason to suppose that the legislature, while using referral language, intended to exclude "unseaworthiness" from the New Jersey Wrongful Death Act whenever it would otherwise apply. The broad language of the statute indicates a contrary intent. The liberal construction to which the statute is entitled also compels a contrary result. It certainly is not just, to deprive dependents of a right to recovery which the deceased himself would have had if he had lived, if the basis of liability is unseaworthiness, but to permit recovery where the basis is negligence.

Two Courts of Appeal have accepted the respondents' construction of the New Jersey Wrongful Death Act. They construed it remedial, referral in nature as to liability, and broad enough to include an action based on unseaworthiness as well as negligence. This construction is supported by the decisions of the New Jersey courts.

Not only was the deceased entitled to have a seaworthy vessel at the time of his injury on petitioner's vessel, but the widow and children of the deceased are entitled to sue under the New Jersey Wrongful Death Act for a breach of the duty to supply a seaworthy vessel where such breach of duty resulted in death.

POINT II

The petitioners owed the deceased the non-delegable duty to provide the deceased a reasonably safe place to work and its failure to fulfill its duty constituted negligence such as would, if death had not ensued, have entitled the person injured to maintain an action for damages.

Although the action for negligence arises by the application of the New Jersey Wrongful Death Act in admiralty, the standard of care is determined by the general maritime law and not by the substantive law of negligence of the State of New Jersey. Since the accident occurred in navigable waters, the general maritime law rather than New Jersey common law would apply. The New Jersey courts would have to apply federal concepts. See *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); *Pioneer Steamship Company* v. *Hill*, 227 F. 2d 262, 264 (6 Cir. 1955); *O'Leary* v. *United States Line Company*, 215 F. 2d 708, 711 (1 Cir. 1954); *New York & Long Branch Steamboat Co.* v. *Johnson*, 195 F. 741 (3 Cir. 1912). In addition the "such as" clause of N. J. S. A. 2A:31-1, by definition, incorporates such rights of the deceased as he would have had if he had lived, which would refer to his rights under federal maritime law.

However, there does not seem to be any great variance between federal maritime law and the common-law of the State of New Jersey relative to concepts of negligence, excepting the matter of common-law defenses. The reference to federal maritime law is more for the purpose of accuracy of legal theory than for difference in practical effect.

In *Anderson* v. *Lorentzen*, 160 F. 2d 173 (2 Cir. 1947) the plaintiffs were longshoremen who contracted dermatitis

caused by handling leaky steel drums containing cashew nut oil. Plaintiff's employer knew that the liquid was a corrosive and even had a special preventive cream on the dock. Judge Chase, affirming a verdict for plaintiffs stated at page 174:

> "The defendants-appellants have argued that, since the employer of the stevedores who unloaded the liquid was aware of the danger, they were under no duty to warn those who worked for that independent contractor. We cannot agree. The defendants-appellants not only owed the duty to provide a seaworthy ship on which these stevedores who unloaded the cargo might work, Seas Shipping Co. Inc. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, but they owed them, as invitees, or business visitors, the duty to provide a reasonably safe place to do their work. Fodera v. Booth American Shipping Corp., 2 Cir., 159 F. 2d 795. *This duty was non-delegable and persisted despite any concurrent duty on the part of the stevedoring company.*" (Italics ours.)

The *Anderson* case, *supra,* was cited in a New Jersey case involving the common law, *Farrell* v. *Diamond Alkali Co.,* 16 N. J. Super. 163, 83 A. 2d 900 (App. Div. 1951). The *Farrell* case applied and followed the general negligence concepts stated in the *Anderson* case.

In *Santamaria* v. *Lamport & Holt Line,* 119 N. J. L. 467, 196 A. 706 (E & A 1938) the plaintiff sued for the death of her husband which occurred while he was engaged in removing his employer's cargo from a vessel. A judgment against the defendant shipowner was affirmed. Among other things, at page 707 of Atlantic Judge Wolfskeil stated:

> "* * *. The *consignee was an invitee,* and its *employees as consequential invitees* shared in the incumbencies due from defendant with respect to providing a reasonably safe place to work. * * *" (Italics ours.)

In *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 107 N. E. 2d 463 (1952) a judgment for a plaintiff longshoreman was affirmed. He claimed he was overcome by fumes from cargo while working on defendant's vessel and he sued also the manufacturer, shipper, and purchaser of the cargo. No claim of unseaworthiness was raised against the vessel. After stating that the state courts will look to the federal "substantive maritime law" for the principles and rules to be applied, Judge Conway then continued at page 320:

> "Under the maritime law a longshoreman who is employed by an independent contractor to load its ship, occupies the status of an invitee aboard the vessel. As such he is entitled to a reasonably safe place to work. The duty of exercising reasonable diligence to provide such a place and warn the longshoreman of hidden dangers devolves upon the owner of the ship. For a breach of that duty liability follows. * * *
>
> *"The duty is non-delegable and the fact that there is a concurrent duty imposed upon the longshoreman's employer to furnish him with a safe place to work does not alter the owner's liability.* * * *" (Italics ours.)

In distinguishing the *McFall* case the trial court commented that in that case the longshoreman was employed by an independent contractor "engaged by the owner" while in the present case, the employer of the deceased was engaged by "the owner of the cargo who was not the owner of the ship" (R. 576). Compare this, however, with *Santamaria* v. *Lamport & Holt Line, Ltd.*, quoted *supra*, and cited by the trial court as well (R. 575) where it was held that the employee of a consignee unloading cargo from a vessel was a consequential invitee entitled to a reasonably safe place to work and the duty to provide one devolved on the owner of the vessel. While the trial court did not say that the deceased was not an invitee with respect to the owners of the

vessel, that would seem to be the implication of the distinction made. Compare *Mayes* v. *Splitdorf Electrical Co.*; 94 N. J. L. 460, 111 A. 10 (E & A 1920); *Restatement, Torts* (1934), Sec. 332. In footnote 6 in *Pope & Talbot Inc.* v. *Hawn*, cited *supra*, Mr. Justice Black speaking for the court at page 413 cited cases illustrative of "the unbroken line of federal cases holding that persons working on ships for independent contractors or persons rightfully transacting business on ships can recover for damages due to shipowner's negligence."

In discussing the *Santamaria* case, quoted *supra*, the trial court stated (R. 576):

> "* * *. *Santamaria* does not hold that a shipowner is liable to a worker for a condition created by his fellow employees. * * *"

This statement ignores the established law that the vessel owner has the non-delegable duty to provide a reasonably safe place to work, regardless of who creates the hazardous conditions. That the employer of the deceased may have had a concurrent duty to provide the deceased with a safe place to work does not relieve the owner of the vessel of his primary duty. Suppose for example a fellow employee of the deceased had dropped a banana peel or other slippery substance on the deck of the vessel and the ship's officers knew of the condition. Would they not have a primary duty to the deceased to have removed the hazard? It can hardly be argued as a matter of common-law or maritime law that they had no such continuing duty.

The shipowner was held liable for failure to provide a safe place to work where the unsafe conditions were created by the employer of the injured party and his fellow employees in *McFall* v. *Compagnia Maritime Belge*, *supra*, where the plaintiff's fellow employees created the unsafe conditions by the rough handling of drums of carbon tetra-

chloride, in *Ryan Stevedoring Co. Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 146 (1956) where the hazardous condition of improper storage was created by the plaintiff's employer, and in *Pioneer Steamship Co.* v. *Hill*, 227 F. 2d 262 (6 Cir. 1955) where the unguarded hole through which the plaintiff fell had been cut in the bunker by the injured man's fellow employees sometime before his accident.

As a matter of fact, in almost all cases of this nature, under maritime law, where recovery by a shipowner is allowed against the employer of an injured party it is implicit that the employer or the injured party's fellow employees caused the unsafe conditions to exist which caused the injury. See for example *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 78 S. Ct. 438, L. Ed. (1958).

Judge Staley in the opinion written below stated (R. 588):

> "The duty of providing Skovgaard with a reasonably safe place to work, * * * would not be lessened even if there were a concurrent duty on the part of Skovgaard's employer. * * * *"

The trial court erroneously, as a matter of law, found there was *no duty* on the part of the vessel owner to provide deceased with a safe place to work. The court stated (R. 576):

> "* * * *. Moreover under New Jersey law when the employee of an independent contractor enters the property at the instance of the owner to correct the precise condition which later causes the employee's injuries the owner is not liable unless he supervised or controlled the employee. *Broecker* v. *Armstrong Cork Co.*, 128 N. J. L. 3 (E. & A. 1942). Here, Skovgaard boarded the vessel to help repair the defect and restore to

operation the pump which caused the oil spill. The entire operation was conducted by El Dorado, and there is no evidence from which to infer that any m/v Tungus personnel supervised or controlled either the discharge of the oil from the tank or the repair of the pump. * * * "

The trial court relied on the *Broecker* case, *supra.* In that case the decedent, an employee of a roofing concern fell through a defective roof which the decedent was repairing. Justice Case after citing a group of cases dealing with the duty to provide the employees of contractors a safe place to work stated at page 196 of Atlantic:

"An effective distinction between the instant case and the decisions to which we have been cited is that here we have an injury caused by the very condition which the plaintiff was engaged to correct and was in the act of correcting. * * * "

The important thing to note is that the *Broecker* case, *supra,* the deceased was caused to be injured and killed by the very condition he was in the process of repairing, i.e., a hole in the roof. In the present case, it was not the duty of deceased to open the tank or to put up the lights, or to place or remove iron beams between hatches, or to clean up oil on the deck. There was no proof of such duty. If a man was repairing a hole in a roof and he fell into the hole that would be one thing. However, if water had come in through the hole and made the floor below wet, slippery and dangerous, that would be an entirely different matter. Cf. *Mormino* v. *Leon Hess, Inc.,* 119 F. Supp. 314 (S. D. N. Y. 1953) aff'd on opinion below in 210 F. 2d 831 (2 Cir. 1954).

Judge Staley, writing for the court below stated (R. 588):

"* * *. It is relevant to note at this point that Skovgaard was called for the purpose of repairing the

pump, not to clean up the oil spill. It is alleged that his death was caused by the condition of the deck and tank and not by the instrumentality he intended to repair. * * * "

Even if maritime law did not provide the test of liability, the New Jersey law does not help the petitioner. In the case of *Berquist* v. *Penterman*, 46 N. J. Super. 74, 134 A. 2d 20 (App. Div. 1957), cert. den. 25 N. J. 55, 134 A. 2d 832 (1957), Judge Goldman made the same distinction that Judge Staley did in this case. At page 25 of Atlantic, he stated:

> "The general rule is that an owner or occupier of premises who, by invitation, express or implied, induces a person to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for the purpose embraced in the invitation. * * * Point Pleasant seeks to escape liability under that rule by arguing the applicability of the exception engrafted upon it by the court in Broecker v. Armstrong Cork Co., 128 N. J. L. 3, 7, 24 A. 2d 194 (E. & A. 1942); that an owner is not liable where an independent contractor or his employee comes upon lands by invitation 'to correct the precise condition which causes the injury.' * * * We do not consider the exception applicable to the instant case. Berquist's injury and eventual death *did not stem from a dangerous condition he was called on to correct*, or one which *necessarily inhered* in the work he was doing. * * * " (Italics ours.)

The *Broecker* case, *supra*, is essentially an assumption of risk case and should be contrasted with *Dixon* v. *United States*, 219 F. 2d 10 (2 Cir. 1955). In that case the chief officer of a vessel brought an action for injuries sustained in a fall when the top rungs of a ladder gave way while he was inspecting the ladder. The case was remanded for further hearings on the issue of negligence. Among other things, Judge Harlan stated at page 16:

"The lower Court held assumption of risk to be no defense because it found that Dixon had no reason to believe that the upper rungs of the ladder were in a dangerous condition, and also because as a matter of law the defense was invalid. We think both grounds were correct. * * * As to the second, the American courts have uniformly refused to allow assumption of risk as a defense to a seaman's action for injuries under the general maritime law. * * * *"

While the above case involved a seaman and member of the crew, it is significant as a statement of the principle of maritime law involved, i.e., that only the admiralty defense of comparative negligence, and not the common-law defenses of asumption of risk and contributory negligence is available. See *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406, 409, 74 S. Ct. 202, 205, 98 L. Ed. 143 (1953); *Socony-Vacuum Oil Co.* v. *Smith,* 305 U. S. 424, 431, 59 S. Ct. 262, 266, 83 L. Ed. 265 (1939); *Imperial Oil Limited* v. *Drlik,* 234 F. 2d 4, 9 (6 Cir. 1956).

Basically the *Broecker* case, *supra,* is no more nor less than a recasting of the assumption of risk doctrine. Instead of setting the matter forth as a defense, it is cast as a rule of "no duty." The fallacy of this device is demonstrated when it is considered what the situation would be if someone else, say a telephone lineman, installing a telephone line, had been injured. The duty of the landowner to the invitee would exist, but the common-law defense of assumption of risk would not be available. The common-law defenses are more fully discussed under Point V, *infra.* They are mentioned here only to show the unsound basis of the *Broecker* decision as applied to negligence under the general admiralty law.

The evidence establishes that the petitioners, their officers and men, at all times were in control of the vessel and the place where the deceased was working. While it is

true that El Dorado people were repairing the pump it is equally true that the officers and crew of the vessel actively inspected the area and they participated in all activities conducted.

In this connection it would be well to keep in mind the facts in *Hawn* v. *Pope & Talbot, Inc.*, cited *supra*, which are stated in the Court of Appeals opinion by Judge McLaughlin. In that case the injured party was "a ship's carpenter foreman." At the time of the accident he and other employees "were making certain minor adjustments to the grain feeders." He "slipped on some loose grain underfoot, fell through an opening caused by the absence of a hatch board to the hold below." There was testimony that the hatch covers had been missing the day before and the morning of the accident. A jury found that the vessel was unseaworthy and also that both plaintiff's employer and the defendant bare-boat charterer were negligent. In discussing negligence, Judge McLaughlin stated at page 803:

> "* * * *. Hawn was working for an intermediate employer. That employer, third party Haenn Corporation, was functioning under its contract with the record owner of the ship. However, there is not the slightest indication that as the ship was temporarily berthed at Philadelphia the appellant had surrendered actual control over it. Under those circumstances appellant was faced with its duty of providing Hawn who was engaged in the ship's service a reasonably safe place to work. * * * *"

In view of the facts and the law cited above the conclusion of the trial court that the owner of the vessel was not under any duty "to protect the workmen of the independent contractor, El Dorado Oil Works" was erroneous as a matter of law (R. 576). The petitioners, as the owners of the vessel had a primary non-delegable duty to provide the

deceased a reasonably safe place to work. This they knowingly failed to do.

POINT III

The petitioners owed the deceased the non-delegable duty to provide the deceased a seaworthy vessel and its failure to do so constituted a wrongful act, neglect or default such as would if death had not ensued, have entitled the person injured to maintain an action for damages.

That the libellant has a cause of action for death based on unseaworthiness under the New Jersey Wrongful Death Act as well as for negligence was discussed under Point I of this brief.

The deceased, although not a member of the crew of the vessel, had come aboard for the purpose of repairing equipment being used in discharging oil cargo and was entitled to the protection of a seaworthy vessel.

The U. S. Supreme Court in its decision in *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953) extended to persons occupying the status of the deceased, the shipowner's liability for unseaworthiness enunciated in the case of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

In *Pope & Talbot* v. *Hawn, supra*, the plaintiff, a carpenter, employee of a refitting company, recovered against the owner of a vessel for an unseaworthy condition. Mr. Justice Black, in affirming the decision of this court, held that a duty to provide a seaworthy vessel was owed to plaintiff. He stated at page 413:

> "• • •. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed

a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law."

Except for the fact that petitioner's vessel was unloading oil rather than loading grain, the above quotation could be directly applied to the present case.

The employees of El Dorado were engaged in discharging oil from the respondent's vessel. The oil was cargo in the same sense that rubber bales or cartons of goods, or sacks of flour would be cargo. Certainly those engaged in discharging oil are no less engaged in work traditionally done by seamen than those discharging other forms of cargo would be. Their functions are basically the same as longshoremen.

Some ships have their own equipment for discharging oil (R. 501). Where equipment is brought on board by those discharging the oil, it merely means that equipment from the shore was used in lieu of ship's equipment. The situation is not uncommon in longshore work. We note that the equipment which was brought on board was used in conjunction with the ship's equipment, *i.e.*, the winches, the heating coils, etc.

The deceased had a function to perform in connection with the unloading of the cargo. It was his job to put in working order the pump used to discharge cargo. Certainly if this were the ship's equipment for discharging oil, this function would be performed by a member of the ship's crew if the work was within the ambit of his skill. It normally would be. Compare: *American Steamship Com-*

pany v. *Copp*, 245 F. 2d 291 (9 Cir. 1957) where the employee of an independent contractor who was dismantling grain fittings, removing charterer's property and refurnishing a ship was held to be entitled to a seaworthy vessel; *Torres* v. *The Kastor*, 227 F. 2d 664 (2 Cir. 1955) where it was held that a workman employed by an independent contractor engaged in cleaning loose pitch from a vessel was entitled to a seaworthy vessel; *Pioneer Steamship Company* v. *Hill*, 227 F. 2d 262 (6 Cir. 1955) where it was stated that a shipfitter's helper employed by a contractor who was making repairs to a vessel during its winter layup was "probably within the broadened class of workers" to whom a duty to provide a seaworthy vessel was owed; *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784 (3 Cir. 1953) where a duty of seaworthiness was held to be owed to employees of a contractor hired "to clean the accumulated rust and dirt from the four deep tanks."

The test based on analogy of work was applied in *Pinion* v. *Mississippi Shipping Co.*, 156 F. Supp. 652 (E. D. La. 1957). In that case the libellant, a plumber-machinist, employed by an independent contractor was injured while on a scaffold replacing some salt water pipe on the vessel. The court held that the scaffolding used, whether furnished by libellant's employer or by the vessel, rendered the vessel unseaworthy and allowed recovery. Judge Wright rejected the view that the work of the libellant did not entitle him to a seaworthy vessel because it did not involve loading equipment as in the *Hawn* case. He stated at page 657:

> "* * *. The short answer to this argument is that the *S.S. Del Mar* herself regularly carries a plumber-machinist as a member of her crew. And a plumber-machinist is precisely the type of seaman qualified to repair or replace short lengths of one-inch pipe. If warranty of seaworthiness applies to landsmen aboard a vessel performing work historically per-

formed by seamen, it should certainly be applied to landsmen aboard performing work currently performed by seamen."

Any qualified member of the ship's crew could have done the work done by the deceased in getting the pumps to operate again. This is typical "ship's work."

The nature of the duty to provide a seaworthy vessel was stated in *Seas Shipping Co.* v. *Sieracki, supra,* by Mr. Justice Rutledge in footnote 11 at page 94:

> "In this connection is pertinent also the frequently stated rule that the obligation of a shipowner to provide a seaworthy ship is non-delegable. * * *"

In *Petterson* v. *Alaska S.S. Co.*, 205 F. 2d 478 (9 Cir. 1953) affirmed *per curiam* in 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954), Chief Judge Denman stated that the question presented in that case was whether a vessel owner is liable for injuries received by an employee of a stevedoring company on board a ship where the injuries are caused by a breaking block brought on board by the stevedoring company. It was argued among other things that the vessel was not liable because control of that portion of the vessel on which the stevedore had been working had been surrendered to the stevedoring company. After reviewing several cases in the Courts of Appeals for the Second and Third Circuits, the opinion concluded at page 480:

> "* * *. The analysis of the relinquishment of control doctrine above made shows that its major premise is that the liability of the shipowner to the stevedore is based on negligence. We have shown that major premise to be incorrect; thus the entire doctrine is incorrect, and it should not be applied here."

Mention should be made of the decision in *Bruszewski* v. *Isthmian S.S. Co.*, 163 F. 2d 720 (3 Cir. 1947) cert. den. 333 U. S. 828, 68 S. Ct. 451, 92 L. Ed. 1113 (1947), which is relied on by the petitioner (P. br. 15, 40, 55). The plaintiff was one of a group of longshoremen assigned to assist the crew of a vessel in removing a broken boom. It was held that there was no evidence of negligence in the operation of removing the boom, so that a directed verdict on that count was affirmed. As to unseaworthiness, Judge O'Connell, speaking for the majority of the court, stated in denying the claim that the boom was unseaworthy at page 722:

> "* * *. To state that a broken boom is warranted as seaworthy would require distortion of the meaning generally accorded those terms. * * *"

The *Bruszewski* decision does not apply factually to the present case. If the deceased in the present case, while assisting in the repair of the pump cut his hand on a broken part in the course of the repair operation, then a situation analogous to the *Bruszewski* case might be present. The deceased was interested only in the job of getting the pump to operate. That was his only duty. He had no duty with reference to the oily condition of the deck and tank cover, of the unguarded tank opening, of the placing of beams between the tanks, or of the lighting. He did not come aboard the vessel to "repair" any of these conditions. The court below did not find that the deceased had the duty to repair any of these conditions and the evidence establishes that he had no such duty. In addition, as respondent has pointed out in the discussion of the *Broecker* case *infra*, under Point II, the rule announced in those two cases is really an assumption of risk rule rather than a "no duty" rule. In the *Bruszewski* case, if the boom had injured another stevedore, not en-

gaged in the job of removing it, the duty to supply a seaworthy vessel would have been recognized. Since assumption of risk is not a defense under the general maritime law, the *Bruszewski* case brings in through the side door, a doctrine which was ejected via the front door. The *Bruszewski* decision states a narrow rule which is to be strictly interpreted.

In *Gindville* v. *American-Hawaiian Steamship Line*, 224 F. 2d 746 (3 Cir. 1955), a longshoreman was injured in the course of unloading a vessel. Suit was instituted for both negligence in loading the cargo and unseaworthiness because of the unsafe manner in which the cargo was stowed. A verdict for plaintiff was affirmed. In the course of his opinion Judge Goodrich stated at page 746:

> "• • •. The defendant asserts broadly that our decision in *Bruszewski* v. *Isthmian SS Co.*, • • •, settles this case in its favor arguing that the danger, if any, was perfectly apparent and that the plaintiff assumed the risk when he went to work in the face of such apparent danger. We think the Bruszewski case does not stand for any such sweeping proposition as this. *Indeed, it is quite narrow.* It means no more than if a carpenter is called in to repair a hole in a roof he cannot complain that a roof with a hole in it is an unsafe place to work. • • •" (Emphasis supplied.)

Judge Goodrich again considered the point raised in *Klimaszewski* v. *Pacific-Atlantic Steamship Co.*, 246 F. 2d 875 (3 Cir. 1957). A longshoreman had been injured when a winch cable slipped and a beam being loaded on the vessel struck him. He stated at page 877:

> "The appellant complains about the court's instruction on assumption of risk. This question need not trouble us either. As in Gindville, we say here that one need only refer back to Socony-Vacuum Oil Co. v. Smith, 1939, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265,

to get the rule with regard to the application of the doctrines of assumption of risk and contributory negligence in a maritime case. The extension of the rule stated in the Socony-Vacuum case to longshoremen is shown in Pope & Talbot, Inc. v. Hawn, 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, and the Gindville case, supra. The new decision of the Sixth Circuit in Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4, certiorari denied, 1956, 352 U. S. 941, 77 S. Ct. 261, 1 L. Ed. 2d 236, is squarely in point with just about every issue raised in this case. *A Longshoreman does not assume the risk of negligence or unseaworthiness and this is so whether his action is based on negligence or unseaworthiness.*" (Italics ours.)

The narrow application of the *Bruszewski* opinion was recognized in *Pinion* v. *Mississippi Shipping Company, supra.* In that case a repairman was injured when a defective pipe on which he was working broke causing him to lose his balance on a narrow scaffold and fall to the deck. Judge Wright held that the repairman could not complain of the defective condition of the pipe on the basis of the *Bruszewski* case. However, he went further and stated at page 656:

"Libellant, however, is on much firmer ground with respect to his charge of unseaworthiness by reason of the scaffolding he was required to use in effecting the repairs. * * * It unquestionably was unsafe equipment with which to work. As such it rendered the vessel unseaworthy and her owner liable in damages.

Respondents' suggestion that the eight-inch plank which formed part of the scaffolding may have been brought aboard the vessel by Ferran cannot save the shipowner from liability for failure to furnish a seaworthy vessel. Whoever furnished the scaffolding, it was still the nondelegable duty of the shipowner to furnish Pinion adequate equipment and a safe place to work. * * * The fact that Pinion was injured as a

result of the unseaworthy equipment makes the shipowner liable for his damages, irrespective of fault. * * *

Respondent also suggests that if the scaffolding was inadequate, Pinion was in the best position to make that appraisal."

The court below found that the deceased had boarded the vessel "to help repair the defect and restore to operation the pump which caused the oil spill" (R. 576). There is no finding that it was the duty of the deceased to clean up the oil spill. In the case of *Mormino* v. *Leon Hess, Inc.*, 119 F. Supp. 314 (S. D. N. Y. 1953) affirmed on opinion below in 210 F. 2d 831 (2 Cir. 1954), the libellant was chief pumpman on a vessel. While repairing a valve which had leaked oil onto the deck, he stepped into the oil and fell. His action was based on the Jones Act and on unseaworthiness. Judge Leibell found, among other things, at page 317 in awarding a decree for libellant:

"There is no controversy in respect to respondent's assertion that it was libelant's duty as chief pumpman to fix the faulty valve. But Mormino was under no duty to clean oil from the deck while it was accumulating. * * *

* * * * *

"* * *. As has been stated heretofore, Mormino's duty was limited to repairing the valve. *It did not extend to the consequences of his delay in making that repair, namely to cleaning oil from the deck. That was for some member of the deck crew to do.*

"Nor is libellant barred from maintaining this action because he sustained his injuries in performance of an act designated to remove the condition which caused his injuries. In relying on such a proposition respondent impliedly invokes the doctrine of assumption of risk. * * *, a defense which is not available in a suit brought under the Jones Act. * * *" (Italics ours.)

In the case of *Rodriguez* v. *The Texas Company*, 254 F. 2d 295 (2 Cir. 1958), the plaintiff, a seaman was injured when he slipped on oil on a platform in the engine room. In affirming a judgment for plaintiff *per curiam*, the court stated at page 297:

> "* * *. The fact that plaintiff was charged with maintaining the platform in a clean condition and the question of whether or not he should have noticed the presence of the oil on the platform, while issues to be considered by the jury in determining the plaintiff's contributory negligence, if any, did not destroy the prima facie case."

In this connection compare *Boat Dagny* v. *Todd*, 224 F. 2d 208, 210 (1 Cir. 1955), where the court held that a trial court rightfully refused to charge in effect that it was the duty of the plaintiff as master of a vessel to see that defective conditions aboard the vessel were repaired, and that his failure to have brushes replaced on a generator, causing the failure of light on a vessel and his consequent injury, barred recovery under both the Jones Act and for unseaworthiness. Compare also *Mason* v. *Lynch Brothers*, 228 F. 2d 709 (4 Cir. 1956); *Sprague* v. *The Texas Co.*, 250 F. 2d 123 (2 Cir. 1957).

It is submitted that the petitioners owed to the deceased an absolute, non-delegable duty to provide the deceased with a seaworthy vessel. This they knowingly failed to do.

POINT IV

The trial court erred in not making findings that petitioners failed to provide the deceased with a safe place to work and failed to provide him with a seaworthy vessel causing his death.

(a) ***Where a trial judge, sitting in admiralty dismisses a libel on an erroneous legal ground and does not pass on the factual issues before him, his decision is fully reviewable on appeal and the appellate court can make the proper findings.***

An admiralty appeal is a trial *de novo*, except that findings of fact based upon credibility of witnesses who testified in open court will not be set aside unless "clearly erroneous." *McAllister* v. *United States*, 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20 (1954); *Petterson* v. *Alaska SS. Co.*, 205 F. 2d 478, 479 (9 Cir. 1953) aff'd *per curiam* 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954). See also *Diamond State Tel. Co.* v. *Atlantic Refining Co.*, 205 F. 2d 402, 409 (3 Cir. 1953); *Barbino* v. *Stanhope S. S. Co.*, 151 F. 2d 553, 555 (2 Cir. 1945). A same scope of review applies under Rule 52(a) F. R. C. P. See *Lehmann* v. *Acheson*, 206 F. 2d 592, 594 (3 Cir. 1953). Moore, *Federal Practice* (2nd Ed. Vol. 5, Sec. 52.03(2) at page 2630.

The crux of the opinion of the trial court is the statement that the court was not persuaded "that the owner of the vessel is under any duty to protect the workmen of the independent contractor" (R. 576). This conclusion is a conclusion of law and is fully reviewable on appeal. There were no findings made as to unseaworthiness. There was no direct finding by the court that petitioners were free from negligence. By implication the court did find negligence when it stated that the owner of the vessel had no duty to protect the workmen of the independent contractor "against

the dangerous conditions created by the very work for which the independent contractor was hired" (R. 576). A large part of the factual background is undisputed. The appeal to the Court of Appeals was essentially based on erroneous application of the law to the facts and the legal conclusions to be drawn from those facts. It was therefore fully reviewable both as to facts and the law applied to those facts.

(b) *The petitioners' officers and crew remained in control of the vessel and they actively participated in the unloading operations.*

In their answer filed in this case, the petitioners admitted "the owners * * * were in possession of and operated, managed and controlled" the vessel involved although they claimed portions of the vessel had been turned over to repairmen, stevedores, etc. (R. 24).

The facts establish that the vessel including the portion of the vessel where the deceased was killed was and remained under control of petitioners, their officers and crew at all times while the incidents involved in this case occurred.

The Chief Officer of the vessel stated that he "gave orders to two members of the crew to be on board all night" (R. 299). These crew members were not loaned by the ship to El Dorado (R. 338). In fact they received overtime from the ship (R. 338). They were there to help El Dorado "to be used for ship's equipment to drive winches, and to hoist their equipment on board ship" (R. 299). The Captain of the vessel remained on board all night (350a), as did the Chief Officer and the officer on watch (R. 299). When the crewmen operated the winches they were directed by the Second Officer, who was the officer on watch (R. 301). In short, aside from other crewmen who might have been on board there were two crewmen who remained on duty

specifically in connection with the unloading operations, as well as the Chief Officer and the officer on watch who were also on duty.

Once it is admitted that the Chief Officer and the officer on watch were on duty, it is ridiculous to claim that they were not masters in their own house. This is borne out by additional facts which were developed. The Captain stated in his deposition that it was part of the duties of the Chief Officer "to look after cargo, upkeep of the ship, and to look after the crew; all the work as to the ship comes under him" (R. 74; R. 523). The Chief Officer stated that "everything concerning with the cargo" was his duty (R. 316).

The Captain stated that it was the duty of the officer on watch to be on the lookout for any defective conditions which might arise and with respect to any unsafe conditions it was his duty to correct them (R. 76; R. 78; R. 523).

The Chief Officer stated that he inspected the vessel, while in port, at least once an hour, "going around the ship, looking in the hatches, and see that the cargo is properly discharged." These inspections he considered part of his duty (R. 318). The Captain also stated that these inspections were part of the Chief Officer's duties (R. 74; R. 523).

The Chief Officer admitted that if he observed any unsafe condition which might cause injury to anybody aboard the vessel, it was his duty to do something about it (R. 318). When asked with relation to oil which might be dropped by stevedores while working on the vessel, whether it was his duty "to see it is corrected; no matter who does it," he answered, "I guess so, if I brought it to the notice of the foreman who knew him job, he would do it. He wouldn't let oil stand around" (R. 320).

From the testimony of the Chief Officer and the Captain it appears that they recognized it was the duty of the vessel

to inspect, to look for, and to correct any unsafe, hazardous, or unseaworthy condition which existed on the vessel. This duty to provide a safe place to work and a seaworthy vessel was an absolute and non-delegable one. The contention of the Chief Officer that it was the duty of El Dorado to remove the oil because of the circumstances under which the oil came on the deck (R. 320), is a matter which may have relevance to the issue of indemnity between the petitioners and the employer of the deceased, but it does not modify the recognized duty owed to the deceased.

There is additional evidence which establishes that the vessel not only retained control of the place where the deceased had been injured, but that the officers and crew actively participated in the events leading to the death of the deceased.

The ship's crew opened up the main deck hatches first (R. 299; R. 339). The ship's crew removed and positioned the tank cover and brought the pump on board (R. 146; R. 147; R. 266; R. 339; R. 457; R. 560, Exh. R-6). The ship's crew in operating the winches were directed by the Second Officer, who was the officer on watch (R. 301; R. 339; R. 276). The ship's crew helped an El Dorado mechanic bolt a suction hose to a pump (R. 462).

The leaking of the pump was discovered by members of the ship's crew (R. 188; R. 302; R. 304; R. 560, Exh. R-6). The ship's crew put a peg into a nipple opening on the pump with a sledge hammer to stop the leak (R. 190; R. 194; R. 208). After the oil was spilled and up to the time of the accident ship's officers were in the vicinity of the oil spill (R. 154; R. 190; R. 195). At the time of the accident there were crew members on the 'tween deck but they were "up forward" (R. 210; R. 350).

After the accident to the deceased, when work was resumed, the ship's crew removed the tank cover so that they could lower the pump (R. 472). They had also put up ropes around the tank opening after the accident (R. 467; R. 469). It can also be inferred that they threw sawdust on the oil because when the first El Dorado man returned to resume operations after the accident (the El Dorado men having left the vessel after the accident to the deceased) he found that "everything had been sawdusted down" (R. 467).

On the basis of the undisputed facts there can only be a finding that the petitioners, their officers and crew never gave up control of any portion of their vessel to the employer of the deceased but on the contrary they actively participated in all the operations conducted by the employer of the deceased. Under the doctrine of unseaworthiness, as discussed under Point III of this brief, the element of control does not present an issue. Nevertheless it was there.

(c) The petitioners' officers knew of the dangerous, hazardous and unseaworthy conditions which caused the death of the decedent and they negligently failed to remedy the situation or to otherwise provide the deceased with a safe place to work.

It was established that the oil came from the break on the fitting in the hose leading from the pump (R. 153; R. 188; R. 572). The court found that the deceased "slipped on the spilled oil and fell to his death into 8 feet of hot oil" (R. 573).

When the El Dorado men first saw the oil spill, officers of the vessel were in the vicinity of the pump (R. 154; R. 190). Ship's officers were present while the El Dorado men were inserting a new fitting (R. 154; R. 155). There was testimony that before the accident, about midnight, members of the crew did some cleaning in the forward

part of the vessel (R. 224). In view of all this it cannot be denied that the vessel, its officers and crew had knowledge of the dangerous and unseaworthy condition which existed at least one hour before the death of the deceased. The vessel's own log entries bear this out (R. 560, Exh. R-6).

In addition, the petitioners' Chief Officer stated that at about 15 minutes past midnight, he went on deck following a report from his Third Officer, who was on watch, and he observed oil spurting out of a hole in the pump line (R. 304). After he had examined the cargo for damage, he talked to Mr. Sexton, the receiving foreman of El Dorado. He claimed that he told him (R. 305):

> "* * *. Well, I told also to sweep the tank hold—the tank covers, where the crew was working on. And I offered to give them sand and sawdust to strew around the platform where they were working on, in order to minimize the danger of slipping in the oil."

This statement also establishes that the vessel, by its officers, had knowledge of the dangerous condition resulting from oil being on the deck prior to the time the deceased came on board and was injured. The part of the conversation relating to the putting the sand or sawdust on the oil was denied by Sexton (R. 484). However, in so far as libellant is concerned it makes no difference whose version of this allegation is accepted. The duty of the vessel to provide a seaworthy vessel and a safe place to work was a non-delegable one so far as the deceased was concerned. The admitted knowledge of the danger and the method of removing it which was available was not used and this establishes not only that an unseaworthy condition existed but negligence on the part of the vessel as well.

In the case of *United States* v. *Harrison,* 245 F. 2d 911 (9 Cir. 1957) a longshoreman had slipped on an oily deck. The deck had been covered with oil when the work started.

The evidence showed that the stevedore gang boss had complained of the condition to the officer in control of the vessel. A judgment for plaintiff was affirmed. Among other things, Judge Fee in his opinion stated at page 916:

> "* * *. The unseaworthiness of this vessel created a non-delegable duty upon the agents of the government to render her seaworthy immediately. The defect was not latent, but was patent to everyone who saw the deck. If the defective condition had been concealed and the Stevedoring Company had been the first to discover it, then a burden might have been placed upon the latter under the contract. But the duty to keep the ship seaworthy, where the conditions are open and notorious to all who looked, is not only non-delegable, but continuous upon the shipowner, master and crew."

In *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329 (9 Cir. 1949) the libellant, a longshoreman, was injured when a large hatch cover fell on him. The appellate court found as a fact that the sole proximate cause of the injury to the libellant was the negligence of his employer in its use of the hatch with knowledge of its defects of dogs and pins. The court gave indemnity to the government, as owner of the vessel, against libellant's employer. In the course of his opinion, Chief Judge Denman stated at page 329:

> "The government admits liability to the stevedore because it had a continuing duty to him to see that at all times he had a safe place to work, and is so liable to him for a failure to keep the vessel seaworthy in that regard. Such liability exists even though the sole proximate cause of such unseaworthiness and the injury to Williams was not the defect in the hatch cover but, as the government claims, its conscious use with knowledge of its defect, by the stevedore's superintendent in a way making it dangerous and causing the injury to Williams."

In *American President Lines* v. *Marine Terminals Corp.*, 234 F. 2d 753 (9 Cir. 1956) a stevedore had sued a shipowner for injuries received when a strongback with a defective locking device was dislodged by a bridle and hook manipulated by a winch operator causing injury to the stevedore. He sued on theories of negligence and unseaworthiness. The shipowner settled and then sued his employer. The court reversed a judgment below and granted indemnity. In concluding that the employer, Marine Terminals Corp. was primarily negligent, Judge Hamlin stated, among other things, at page 759:

> "* * *. Here, Marine was charged with notice before the accident from the ship's officer that some strongbacks were defective and from its own employees that the particular strongback involved here had no lock and was unsafe. It would have taken little time to remove the lockless beam. * * *"

In both of the above cases, the vessels, by their respective officers, had knowledge of defective, dangerous, and unseaworthy conditions on board. In both cases it was recognized that the shipowner had breached its duty to provide a safe place to work and a seaworthy vessel even though the shipowner successfully transferred its liability on a theory of indemnity to the employer of the injured party. As far as libellant is concerned it is immaterial whether petitioners in this case are successful in transferring their liability to the respondent-impleaded. The duty of petitioners to the deceased is the same whether indemnity is granted or not.

As has been pointed out in our prior discussion, it makes no difference who or what creates the unsafe and hazardous conditions, the duty of the shipowner to provide a seaworthy vessel and a safe place to work remains the same. For example in *Oakes* v. *Graham Towing Co.*, 135 F. Supp.

485 (E. D. Pa. 1955) a seaman settled his case against a shipowner. The shipowner successfully sought indemnity from the drydock. Before granting indemnity against the shipyard where the vessel had been drydocked at the time, Chief Judge Kirkpatrick had to find that the shipowner was justified in making a settlement with the seaman and he did. The seaman had been injured because of grease and oil on a ladder he used to get on the ship. The court stated among other things at page 486:

> "The floor of the drydock was littered with equipment and covered with oil and grease. Men traversing it were bound to get grease on their shoes, which is undoubtedly the way in which the grease came to be on the ladder.
>
> "Regardless of who furnished the ladders, they constituted the only means for the ship's crew to get off and on the ship and, as such, became a part of the ship itself. The shipowner's failure to keep the ladder free of dangerous accumulations of grease made the ship unseaworthy and, in addition, constituted negligence."

In the *Oakes* case the grease and oil came on the ladder because of a condition created by the drydock company and not by the shipowner, yet the court found not only that an unseaworthy condition existed but that the shipowner was negligent in spite of this fact.

In *Grillea* v. *United States*, 232 F. 2d 919 (2 Cir. 1956) a longshoreman was injured when he fell through an open hatch while working on board a vessel owned by the defendant but chartered to another. A decree for respondent was reversed with directions to enter a decree for libellant. In the course of his opinion Judge Learned Hand stated that although the libellant and another longshoreman had laid the wrong hatch cover over a "pad-eye" so that it

wobbled causing him to fall subsequently when he stepped on it, the vessel was unseaworthy because of the condition created. The court's statement on this point was reemphasized on a petition for rehearing where the court *per curiam* stated at page 925:

> "The respondents are right in saying that it was not the libellant and DiDonna who misplaced the cover that later rocked and made the libellant fall. This was misplaced by two other members of the same gang before the libellant and DiDonna walked over it. It is impossible to see what conceivable difference this can make in the result; indeed, if anything, it confirms our ruling."

In view of the law as set forth in the above cases and in the cases discussed under Points II and III concerning the non-delegable duty of the vessel owner to provide a seaworthy vessel and a safe place to work, it follows *as a matter of law* that the Chief Officer of the vessel could not avoid the responsibility of the vessel by any statement or "suggestion" he made to Mr. Sexton.

The Chief Officer admitted that sawdust is put on oil "not to slip" and he stated he would "consider it safer to have sawdust on oil instead of having nothing" (R. 322). After the accident the ship's crew put ropes around the tank opening (R. 469), and everything was "sawdusted down" (R. 467). If the oil had been cleared away and the area sawdusted before the accident to the deceased, the accident could have been avoided.

The evidence indicates that the last oil came from the break when the ship's crew put the peg in the nipple of the pump and stopped the leak (R. 190). This was before midnight according to the recollection of Russo and Donohue (R. 157; R. 190), although the ship's log entry for this was 15 minutes after midnight (R. 560; Exh. R-6).

The log entry dealing with the death of the deceased is timed at 1:25 a. m. (R. 560; Exh. R-6). This means that the ship's officers had knowledge of the unsafe and dangerous condition created by the existence of oil on a tank cover, hatch beams, and adjoining area near an open unguarded tank of hot oil for *at least one hour* before the deceased came on board.

The officers of the vessel knew of the dangerous and unseaworthy conditions which caused the death of the deceased. They had the means to remove them or to guard against them. They had ample time to do so. In so far as unseaworthiness is concerned this element of notice and knowledge is immaterial. It was there nevertheless.

(d) *The deceased came on board petitioners' vessel to assist in repairing the pump and restoring it to operation but he had no duty to repair, remove or correct the dangerous and unseaworthy conditions which caused his death.*

The court below specifically found that the deceased, "a maintenance foreman employed by El Dorado, was called from his home to assist in repairing the pump and restoring it to operation" (R. 573).

Before petitioners' vessel came in the deceased had checked the pump, with a machinist named Wagner. They were satisfied that it was in good working condition and it was then taken to the pier, to await the arrival of petitioners' vessel (R. 454). The deceased was not there when the pump was placed on board petitioners' vessel or when it started operation (R. 460). He was home with his wife having coffee and pizza pie when he received a call to come down to the pier to assist in getting the pump operating again after it had developed the leak which was stopped and then repaired (R. 134; R. 484; R. 156). The deceased did not go on board and did not have any duty

to perform on board petitioners' vessel until he boarded it in response to a call a short time before his death.

No claim can be made that it was the duty of the deceased, or that the deceased in any way, placed or even supervised the placing of the pump on petitioners' vessel, that the deceased placed or even supervised the placing of the tank lid on the tank top, that the deceased placed or supervised the placing of the beams in the walkway between the tank tops; that the deceased had the duty to clean or even the duty to supervise the cleaning of oil from the area around the tank lid. The uncontradicted evidence shows that the duty of the deceased prior to and at the time of his death was "to help repair the defect and restore to operation the pump which caused the oil spill" (R. 576).

In *Mormino* v. *Hess*, quoted *supra* under Point III of this brief, the court found the vessel owner negligent and liable to a chief pumpman who was injured on oil from a leaking manifold valve. The court found that the libellant had the duty "to fix the faulty valve" but that he was under "no duty to clean the oil from the deck while it was accumulating." Judge Leibell found that "cleaning oil from the deck would fall under the heading of 'general cleaning'" pursuant to a union contract and that these duties could not be assigned to a chief pumpman (119 F. Supp. 314, 317). In the present case it is clear that the deceased was a maintenance foreman. Everything which had to do with the receiving of oil was under the jurisdiction of Mr. Sexton who had been there all night (R. 165; R. 491). The plant superintendent who was superior to both the deceased and Sexton was Mr. Blaney (R. 227). In explaining the duties of Mr. Russo, a maintenance mechanic, who had been on duty that night, Mr. Sexton stated (R. 498):

> "Salvatore Russo was loaned from the Maintenance Department, which was due to a union deal that we

had down there, Salvatore Russo was connected with the Maintenance Department and we had to have a maintenance man on the pump."

This indicates that there was a clear and definite division of functions at the El Dorado plant. Cleaning oil from the deck, beams, tank top of petitioners' vessel was not a function assigned to the deceased.

There was some dispute relating to the issue of who had the duty to clean up the spilled oil as between the vessel and El Dorado.

There was testimony that it was the practice for the ship's crew to clean up oil from pumps (R. 515; R. 200). The Chief Officer claimed that if oil was spilled on the deck by the ship's crew he recognized that it was the ship's duty to remove it, but he felt that if it was a stevedore who soiled the deck it was the stevedore's duty and not that of the ship (R. 319). Obviously if the ship had a non-delegable duty to provide a safe place to work and a seaworthy vessel, the distinction claimed by the Chief Officer has no validity as far as libellant is concerned.

In this connection we note that the Chief Officer admitted that the vessel carried sawdust, although he denied the statement of his own Captain that the purpose of the sawdust being carried was to dry up oil and water if spilled (R. 92; R. 325). He admitted that sawdust is put on oil so that it would not be too slippery (R. 322). The Chief Officer claims he "suggested" to Mr. Sexton, the El Dorado receiving foreman, that sawdust be applied (R. 347; R. 560; Exh. R-6). The El Dorado foreman denied this (R. 484). The fact that the vessel transported oil and had sawdust on board which was used to dry up oil and water lends credence to the fact that the ship recognized its duty to clean the oil or to reduce hazards arising from its presence.

The evidence does not establish that it was the duty of the deceased to remedy the dangerous and unseaworthy condition created by the existence of oil on a tank lid, beams, and deck area near an open tank of hot oil.

(c) *The deceased exercised due care for his own safety.*

The dissent in the Court of Appeals, based on New Jersey law stated that it appeared that the deceased had known of the dangerous condition and had therefore assumed the risk as the New Jersey courts would apply the doctrine (R. 595). In the first place it does not appear as a fact that the deceased knew that the oil on the deck in the area of the tank had not been cleaned up or that some steps had not been taken by the vessel to correct any hazards created by the oil spill. It would have been reasonable for the deceased to have assumed that all was safe because work was being done in the area when he arrived. Secondly, there is a presumption that the deceased used due care. *Watn* v. *Pennsylvania Railroad Co.*, 255 F. 2d 856 (3 Cir. 1958). Finally, the matter is regarded in New Jersey law as a question of fact involving the defense of assumption of risk, a defense which must be proved by the defendant. Cf. *Hendrikson* v. *Koppers Co.*, 11 N. J. 600, 95 A. 2d 710 (1953).

The deceased was not aboard petitioners' vessel when the oil spilled. He was not on duty at that time but was at home. At the time he left the plant, he had checked the pump with a machinist named Wagner and they found the pump in good working order (R. 455). The pump was then left on the pier to await the arrival of the vessel. O'Leary, another mechanic, installed the pump when the vessel arrived. He found the pump working satisfactorily (R. 459). Mr. Sampson, who was a standby on the pump from 9:00 p.m. to 11:00 p.m., found the pump operating "very good" (R. 476). There certainly was no evidence

that the deceased knew or should have known of the defective condition of the pump or that he should have anticipated the way in which it would be placed on the tank top.

When the deceased came to the vessel that night, he was entering the area where the tank and the pump were for the first time. He had not conducted any general inspection of the premises as the Chief Mate had done. He had not been working in the immediate area of the pump where Russo and Donohue had been working. He had not been standing around as the officers of the vessel had been doing. He was concerned with one immediate problem and that was to help Russo and Donohue to get suction on the pump (R. 158; R. 197).

When the deceased walked to the pump, Mr. Russo testified that he had been walking "just normally like taking his step" (R. 199).

Not only does the deceased have the benefit of the presumption that he exercised due care, but there is no evidence in the record that would justify a finding to the contrary.

POINT V

The defenses of contributory negligence and assumption of risk are not available in a wrongful death action based on a maritime tort and in addition there was no evidence to establish that the deceased had been negligent or that he assumed the risk of petitioners' negligence or of unseaworthy conditions.

We have already discussed the referral nature of the New Jersey Wrongful Death Act. Since the New Jersey statute, by its terms, gives a right to recovery based on the maritime rights and duties relating to unseaworthiness, then it incorporates all of the maritime law relating to standards of care, etc., that go with it. In *Halecki* v. *United New York & New Jersey S. H. P. Ass'n*, 251 F. 2d 708 (2 Cir. 1958), Judge Learned Hand stated at page 712:

> "* * *. Although, as we have said, we are not dealing with 'federal maritime law,' we should remember that so far as we can we ought to construe the statute so as to avoid capricious and irrational distinctions. We leave open whether New Jersey is without power to take as much or as little of the rights 'rooted in federal maritime law' as it chooses as the model for the right it confers upon the next of kin; but the courts of that state have never passed upon the question, and to deny the exemption to the next of kin seems to us to the last degree capricious and irrational. * * *. Obviously, the answer is not certain; we must do as best we can with what we have, and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar."

The trial court made no findings either as to assumption of risk or contributory negligence. The Court of Appeals, in view of the lack of findings in this regard did not "decide factually what defenses, if any, might be available to the respondent" (R. 588).

We note that the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1 *et s q.* does not anywhere state that contributory negligence is a defense to an action under the act. Cf. *The Devona,* 1 F. 2d 482, 484 (D. C. Me. 1924). The substantive law relating to liability is incorporated by reference and is coextensive with the substantive law of liability for personal injury as distinguished from wrongful death.

It is not questioned that in common-law actions arising under the New Jersey Wrongful Death Act, common-law defenses are applied. The act itself measures liability by the test of whether or not the deceased, if death had not ensued, would have been able to maintain an action. Obviously in a common-law action, which is what is involved in all the New Jersey decisions cited by petitioners in their brief, the common-law defenses would bar recovery. Logically, therefore, in a maritime case, the maritime defenses should prevail because the act itself refers to the substantive rules of maritime law in such cases.

Even as a matter of statutory construction, the courts must imply a *sang-froid* to the New Jersey legislature in order to hold that whereas a seriously injured father and husband is entitled to a recovery under the maritime law even if contributorily negligent, his wholly innocent children and wife would be denied such recovery if he dies from his injuries. The legislature has not set forth this defense in the statute. Courts do not construe statutes in such a way as to produce harsh or absurd results. See *Cox* v. *Roth,* 348 U. S. 207, 209, 75 S. Ct. 242, 99 L. Ed. 260 (1955); *Giordiano* v. *City Commission of Newark,* 2 N. J. 585, 67 A. 2d 454, 458 (1949). This statute is a remedial one and is entitled to a liberal construction. Therefore under the terms of the New Jersey statute itself, independently of any compulsion from a positive rule of maritime law, the rights of a widow and children with

reference to the contributory negligence of a deceased workman are coextensive with the rights he would have enjoyed had he lived.

There is another ground for holding that contributory negligence is not a defense under the maritime law where a state wrongful death act is applied. The reason that maritime law permits a state wrongful death act to be applied where certain individuals die as a result of injuries received on navigable waters within a state's geographic boundaries is that there is a void in the maritime law on this point. Congress in the development of maritime law has not afforded any remedy by statute for wrongful death in such circumstances. While there is a void as to wrongful death this is not true concerning the defense of contributory negligence. Admiralty courts have fashioned a strong positive rule concerning comparative negligence. While the enforcement of a state statute giving a remedy for wrongful death merely fills a void, the enforcement of a state rule of contributory negligence would collide with the positive, well established rule of comparative negligence in maritime law.

In the case of *Wilburn Boat Company* v. *Fireman's Fund Insurance Company,* 348 U. S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955) Mr. Justice Black, in holding that state laws could be applied in disputes arising from a maritime insurance policy stated at page 370:

> "Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction. * * * But it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty rule. *In the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States.* As later discussed in more detail, this state regulatory power, exercised with

federal consent or acquiescence, has always been particularly broad in relation to insurance companies and the contracts they make.

Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute. But this does not answer the questions presented, since *in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress.* * * *" (Italics ours.)

What, then, is the substantive maritime law as it relates to liability for personal injury? In *Hawn* v. *Pope & Talbot, Inc.*, 198 F. 2d 800 (3 Cir. 1952), Judge McLaughlin stated at page 806:

"* * * Appellant advances the flat proposition that since it is a diversity action the Pennsylvania contributory negligence rule which defeats recovery must be applied. * * *

"We think that appellant's view is incorrect. * * *"

On appeal the judgment of the court was affirmed in 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953). Mr. Justice Black stated at page 408:

"(a) *The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires.* Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which auto-

matically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.

"(b) Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under national power to control in 'its substantive as well as its procedural features. * * *' * * * And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. *Even if Hawn were seeking to enforce a state-created remedy for this right, federal maritime law would be controlling.* While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. * * *" (Italics ours.)

In *O'Leary* v. *United States Line Company*, 215 F. 2d 708 (1 Cir. 1954); cert. den. 348 U. S. 939, 75 S. Ct. 360, 99 L. Ed. 735 (1955), Judge Woodbury reviewed several decisions, including one from this circuit, and discussed the question of contributory negligence under a state wrongful death act. He stated at page 711:

"* * * But these cases were all decided prior to Pope & Talbot, Inc. v. Hawn, 1953; 346 U. S. 406, 74 S. Ct. 202 wherein the Supreme Court of the United States in a civil action on the law side under the sav-

ing clause for the first time held categorically that the rights of a shore worker to recover for personal injuries short of death occurring on a vessel in the navigable waters of a state resulting from either the negligence of the shipowner or the unseaworthiness of the vessel are to be determined by the general maritime law and not by the law of the state within whose waters the accident occurred. That case, of course, is not squarely in point here, but in the Court's opinion 346 U. S. at page 409, 74 S. Ct. at page 205 it is said by way of dictum that 'Even if Hawn were seeking to enforce a state-created remedy for this right (referring to his right of recovery for unseaworthiness and negligence), federal maritime law would be controlling.' Indeed, in our opinion it would be incongruous to hold, in conformity with Pope & Talbot, Inc. v. Hawn, supra, that the maritime law determined the respective rights of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate consequence of death. And, it would be even more incongruous to hold that the husband's right of action, which the plaintiff here asserts in her count two under the local survival statute, is to be determined under the rule of Pope & Talbot by the maritime law, but that the right of action arising out of the same accident conferred directly upon her by the local death act is to be determined by local law. Furthermore, as the Supreme Court pointed out in Chelentis v. Luckenbach S.S. Co., 1918, 247 U. S. 372, 384, 38 S. Ct. 501, 62 L. Ed. 1171, the saving clause reveals no intention that liability as well as remedy shall be determined by the common law rather than the maritime law, and to apply state substantive law to determine the rights of the parties would create divergence in a field where uniformity has long been considered important. * * *"

In *The Devona*, 1 F. 2d 482 (D. C. Me. 1924) the court had before it the Maine Wrongful Death Act which uses the same key phraseology as the New Jersey Act. In

denying the applicability of the common-law defense of contributory negligence, Judge Held stated among other things at page 484:

> "The case at bar also discloses rights distinctly maritime and 'recognized by the law of the sea,' without regard to the court where the libelant may seek relief. The libelant must take the state statute with its limitation; *but the limitation of contributory negligence is not found in the statute.* A state court may well find that it cannot settle a maritime case by the common-law rules of procedure, and must enforce the libelant's rights under the maritime provisions as disclosed in the Jensen Case, which has held that 'no state has the power to abolish the well-recognized maritime rule concerning the measure of recovery, and substitute therefor the full indemnity rule of the common law.'" (Italics ours.)

There are two distinct grounds for holding that contributory negligence is not a defense to this action under the New Jersey Wrongful Death Act. The first is based on the interpretation of the act itself. The act does not state that such defense is available in an action for wrongful death. On the contrary, the referral phrase "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages" is used, N. J. S. A. 2A:31-1. This phrase, by referring to the rights of the person injured, if death had not ensued, indicates that not only is the substantive law relating to the nature and scope of liability for personal injury incorporated into the wrongful death act, but the defenses are incorporated as well. There is certainly no reason to suppose the legislature intended to give any better or stronger defense to the petitioners where a widow and dependent children sue than where the injured himself sues.

The second ground is based on the fact that the injury occurred on navigable waters of the United States and is

covered by substantive maritime law which supersedes and overrules inconsistent state law. The doctrine of comparative negligence is a positive rule of maritime law and is firmly embedded in maritime law. There certainly is no reason why it should be replaced by a harsh and inconsistent state doctrine.

In this connection we note that *Klingseisen* v. *Costanzo Transportation Co.*, 101 F. 2d 903 (3 Cir. 1939) cited by defendant, held that in an action under maritime law applying the Pennsylvania Wrongful Death Act, the absolute defense of contributory negligence would be applied. In that case the deceased was drowned in a collision between his own boat and a steam boat. No issue of unseaworthiness was involved. Since this case involved an application of a Pennsylvania statute and its interpretation by Pennsylvania courts it is not controlling in an interpretation of a New Jersey statute.

In the Pennsylvania statute, 12 Purdon, Penna. Statutes Anno. ss1601, the test of liability is merely set forth as "unlawful violence or negligence" rather than "wrongful act, neglect or default" as set forth in the New Jersey statute. Furthermore, the Pennsylvania statute does not not employ the "such as" test of the New Jersey statute which incorporates the test of liability based on the rights of the deceased if he had lived.

CONCLUSION

The evidence is overwhelming that the presence of oil on the tank lid, beams, and area near the open unguarded tank of hot oil rendered the place of work dangerous, hazardous, and unsafe and the vessel unseaworthy. The Chief Officer of the vessel who knew of these conditions, at least an hour before the accident to the deceased, stated as much. There were means on board by which the Chief Officer and his crew could have remedied the conditions. They were not used.

Whatever may have been the duty of the employer of the deceased, the duty of the vessel to provide a safe place to work and a seaworthy vessel was non-delegable. Respondent has established her claim against petitioners and should be given an award for the monetary damages sustained by herself and her three infant children.

WHEREFORE, respondent requests that the judgment of the United States Court of Appeals be affirmed with costs on this appeal.

Respectfully submitted,

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